

Name: Philip Fons
 Student ID: 00001256539
 Birthdate :

Print Date: 1/29/22

Fall 2011

Program: Undergraduate Business

Course	Description	Attempted	Earned	Grade	Points
ACCT 301	Managerial Accounting	3.000	3.000	C+	6.990
ACCT 303	Intermediate Accounting I	3.000	3.000	B	9.000
COMM 101	Pub Speak/Crit Thinking	3.000	0.000	W	0.000
FINC 335	Investments	3.000	3.000	B	9.000
ISOM 332	Operations Management	3.000	3.000	B+	9.990
MLSC 301	Military Science III	3.000	3.000	A	12.000
MLSC 351	Physical Readiness III	1.000	1.000	A	4.000
Term GPA	3.186 Term Totals	16.000	16.000		50.980
Cum GPA	3.367 Cum Totals	90.000	90.000		303.060

Course	Description	Attempted	Earned	Grade	Points
ACCT 328	Concepts in Taxation	3.000	3.000	A-	11.010
BSAD 220	Internship&Career Preparation	1.000	1.000	A	4.000
CLST 273	Classical Tragedy Topic: Classical Tragedy	3.000	3.000	A	12.000
ENGL 210	Business Writing Writing Intensive	3.000	3.000	A	12.000
MGMT 341	Ethics in Business	3.000	3.000	A	12.000
MLSC 302	Adv Leadership II	3.000	3.000	A	12.000
MLSC 352	Physical Training VI	1.000	1.000	A	4.000
Term GPA	3.942 Term Totals	17.000	17.000		67.010
Cum GPA	3.459 Cum Totals	107.000	107.000		370.070

Spring 2012

Program: Undergraduate Business

Fall 2012

Program: Undergraduate Business

Course	Description	Attempted	Earned	Grade	Points
ACCT 304	Intermed Accounting II	3.000	3.000	B+	9.990
ACCT 308	Acctg Information Systems	3.000	3.000	A-	11.010
CLST 271	Classical Mythology	3.000	3.000	A-	11.010
MGMT 304	Strategic Management	3.000	3.000	A-	11.010
MLSC 311	Military Science IV	3.000	3.000	A	12.000
MLSC 361	Physical Readiness IV	1.000	1.000	A	4.000
MUSC 101	Music:Art of Listening	3.000	3.000	A	12.000

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Term GPA	3.738	Term Totals	19.000	19.000	71.020
Cum GPA	3.501	Cum Totals	126.000	126.000	441.090

Spring 2013

Program: Undergraduate Business

Course	Description	Attempted	Earned	Grade	Points
ACCT 306	Adv Acct Bus Com Consl In	3.000	3.000	B+	9.990
ACCT 311	Auditg & Intrnl Cntrl Sys	3.000	3.000	B+	9.990
ENGL 272	Exploring Drama Writing Intensive	3.000	3.000	A	12.000
MLSC 312	Adv Leadership IV	3.000	3.000	A	12.000
MLSC 362	Physical Training VIII	1.000	1.000	A	4.000
PHYS 102	Planetary & Stellar Astronomy	3.000	3.000	A	12.000
Term GPA	3.749	Term Totals	16.000	16.000	59.980
Cum GPA	3.529	Cum Totals	142.000	142.000	501.070

Undergraduate Career Totals

Cum GPA:	3.529	Cum Totals	142.000	142.000	501.070
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End of Loyola Unofficial Transcript



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April 16, 2023

The Honorable Michael B. Brennan
U.S. Court of Appeals for the Seventh Circuit
517 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Re: Philip Fons – Letter of Recommendation

Dear Judge Brennan:

It is my great privilege to provide the highest recommendation I can offer on behalf of Philip Fons in his application for a judicial clerkship with your Court. In my time working with Phil, he amply demonstrated the skillset necessary to succeed as a clerk: intellectual curiosity, keen intelligence, and a naturally collegial temperament. I can say unequivocally that Phil would be a great asset to your chambers, just as he was to our office.

I first met Phil a year ago, when he interviewed for a summer internship with Kohler's Labor & Employment department. I was immediately impressed with his composure. Self-assured but not arrogant, he demonstrated the exact demeanor that one would hope to expect from a veteran U.S. Army officer. To say that he stood out among his fellow 1Ls would be a significant understatement. After reviewing dozens of applications and interviewing ten candidates, Phil was head and shoulders above the rest. I was grateful when he accepted our offer.

I was even more grateful once summer arrived and Phil got to work. Though he came into the Summer with zero employment law experience, our entire department came to rely on Phil very quickly and in matters of great importance to Kohler. Among many other tasks, Phil drafted position statements that we submitted with very little editing to the U.S. Equal Employment Opportunity Commission and the Wisconsin Equal Rights Division, as well as portions of briefs we submitted to labor arbitrators in both Wisconsin and Canada. In addition, I personally trusted him to meet directly with our business colleagues to provide them with sophisticated advice on legal issues. It is no exaggeration to say that Phil completed assignments that would have otherwise been undertaken by experienced outside counsel – with no discernable drop in quality.

Phil was able to have this kind of impact for a few reasons. First, to put it bluntly, he has the intellectual horsepower. He is smart enough that he has been able to succeed both academically and professionally despite having a newborn child at home and a wife working as a nurse. I know from personal experience (I started law school with a two-month-old child and a wife in medical school) that to succeed in that environment, it is immensely helpful to be able to pick up new concepts quickly. Phil demonstrated that ability repeatedly in his time at Kohler. I have no doubt that he would do likewise in a clerkship environment.

Similarly, Phil is intellectually curious. Even before his Kohler internship began, he reached out on multiple occasions to ask what he could read and learn ahead of time so that he could ensure he was providing as much value as possible. That

interest in the law and drive to succeed will set him up for success in the clerkship environment, where clerks (and judges!) are the last true general practitioners. I have no doubt that Phil will do what it takes to become an expert in all the areas of law that he would see as a clerk.

Finally, I am aware from my own Seventh Circuit clerkship experience that collegiality is critically important to a chambers functioning successfully. Phil will be an asset on that score as well. He is mature and thoughtful and got along with everyone at Kohler during his internship. Though this is pure speculation, I strongly suspect that his time in the military leading soldiers has given him both an appreciation of the need to develop relationships with a diverse community and the skillset to do so. Whatever the reason, I can say confidently that Phil will be a great colleague to your entire chambers, just as he was in our office.

In short, without hesitation or qualification, I offer a full endorsement and recommendation of Phil as a judicial clerk. If there is any additional information I can share, please feel free to contact me at any time.

Sincerely,

Ryan Parsons
Kohler Co.
Senior Director – Labor & Employment

April 21, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

It is with great pleasure that I recommend Philip Fons for a clerkship in your chambers. Phil brings rich life experience, diligence, intellect, and good humor to all that he does. Based on my extensive interactions with Phil and his work and based on my own experience as a clerk, I believe Phil will make a truly excellent addition to your clerkship class.

For several years, I have had the privilege of teaching Marquette University Law School's upper-level legislation course, which Phil took this past fall. Phil earned an honors grade in the course, but, in Phil's case, I do not believe that his grade alone tells the full story of his outstanding performance in the class. Phil's participation in class discussion was not mechanical; it was thoughtful and probing. For instance, I distinctly recall, after having worked through an excerpted case that hinged on statutory language (appropriately, given the course), Phil asking why the case turned on the statutory question at all, when there was a more pressing constitutional question likely at play. I remember this particular question because it was a perfect example of Phil's approach to his legal education: he thinks beyond the page, beyond the assignment, in an effort to understand the bigger picture.

My legislation course is a little untraditional in that, in addition to the standard theoretical and interpretive fare, I also teach in-depth units on the legislative process (including the appropriations and authorizations process, reconciliation, and the filibuster) and legislative drafting. To assess these less traditional units, I ask students to complete a drafting assignment wherein they craft a piece of federal legislation in response to a prompt and annotate the legislation with endnotes to explain their formatting and substantive choices. Phil had one of the strongest drafts in the class. His legislation, which proposed a funding scheme to address a matter highlighted in a recent series of articles in a local newspaper, was creative and yet appropriately measured. Moreover, Phil's writing was clear, focused, succinct, and—critically—error-free.

Outside of the classroom, I have had the opportunity to get to know Phil, by turns, as an admitted student, an advisee, a student leader, and, in many respects, a colleague. In fact, I first met Phil when, as an admitted student and new father, he approached me with a question at an admissions event. It was there that we talked about balancing the demands (and joys) of parenthood with those of a legal education. It goes without saying that Phil has managed the balance masterfully. If the subject comes up, Phil will gush about his daughter, Charlotte, and he has even provided me, as a new parent, with invaluable advice. But, somehow, he also manages to take on an exceedingly demanding curricular load with grace, not to mention success. In his second year of law school, Phil enrolled in our dean's Supreme Court seminar (which is notoriously challenging and boasts an enrollment of primarily third-year students who are at the top of their class). He also earned a position on the *Marquette Law Review* editorial board, served as an Academic Success Program leader for civil procedure, completed a federal judicial internship, and—to bring things full circle—served as a panelist with me at the very admissions event at which we first met a couple of years ago. In other words, Phil has taken on challenging coursework, enriching co-curricular opportunities, and volunteer positions to help newer students. The quality of his work remains stellar throughout, and his participation enriches the experience for all involved.

Finally, I would be remiss if I did not also mention Phil's military background, as I believe his training, experience, and accomplishments in the U.S. Army have informed his approach to his legal education and future career. After receiving his bachelor's degree in 2013, Phil enlisted in the military and eventually became a Black Hawk helicopter pilot, overseeing a team of soldiers. It's not difficult to see the through line: Phil's maturity, sharp mind, dedication to public service, high expectations for himself and those around him, and commitment to excellence are the hallmarks of his professional identity. I can think of no student whom I would trust more than Phil with the type of consequential work undertaken in chambers.

If I can provide any additional information in support of Phil's candidacy, I hope that you will contact me. Thank you very much for your consideration of his application.

Respectfully,

Anna Fodor
Assistant Dean of Students & Adjunct Associate Professor of Law
Marquette University Law School

Phone Number: (414) 288-5121
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Anna Fodor - anna.fodor@marquette.edu - 414-288-5121

PHILIP H. FONS(414) 217-0666 | philip.fons@marquette.edu

WRITING SAMPLE #1

The writing sample below is from a course I took in the fall of my second year entitled “Seminar: The Supreme Court.” The structure of the course was unique. The course had 12 students that were split into six pairs. Each pair was assigned a pending case before the United States Supreme Court for which the briefs had been filed but oral arguments had yet to be heard. Each pair of students was then split between arguing for the petitioner or respondent, and then assigned to present oral arguments to the rest of the students in the course whose role was to act as the Court. Oral arguments occurred on a weekly basis. After the completion of oral arguments, students were required to write a majority opinion for any case that was argued in front of the class.

I chose to write my majority opinion for the case *Mallory v. Norfolk Southern Railway Co.* The sole issue in *Mallory* is whether the respondent-defendant, Norfolk Southern, is subject to the state of Pennsylvania’s personal jurisdiction. The case has not yet been decided by the Supreme Court. Needless to say, I am anxiously awaiting the Court’s opinion to see how it matches up with my own.

SUPREME COURT OF THE UNITED STATES

No. 21-1168

ROBERT MALLORY,

Petitioner,

v.

NORFOLK SOUTHERN RAILWAY CO.,

Respondent.

ON WRIT OF CERTIORARI
TO THE PENNSYLVANIA SUPREME COURT

[November 26, 2022]

JUSTICE FONS delivered the opinion of the Court.

Pennsylvania law requires any out-of-state corporation that does business in the Commonwealth to register with the state. The law further provides that such registration deems an out-of-state corporation subject to jurisdiction in Pennsylvania’s courts even for activities that have no other connection to the Commonwealth. We must decide whether a state’s assertion of personal jurisdiction on this basis is consistent with the Fourteenth Amendment’s Due Process Clause.

I

Petitioner, Robert Mallory, worked for Respondent, Norfolk Southern Railway Company, for almost 20 years in Virginia and Ohio. Mallory sued Norfolk Southern in Pennsylvania state court, alleging that Norfolk Southern’s negligence exposed him to toxic chemicals that caused him to develop colon cancer. When Mallory filed the lawsuit, he was a resident of Virginia, and Norfolk Southern’s principal place of business was in Virginia.

Norfolk Southern filed a motion to dismiss the lawsuit for lack of personal jurisdiction in the Pennsylvania state court. Mallory responded that Norfolk Southern consented to Pennsylvania's jurisdiction by registering to do business there. Mallory's response was premised on a portion of Pennsylvania's long-arm statutory scheme, which deems any out-of-state corporation registered as a "foreign" corporation subject to the Commonwealth's exercise of "general personal jurisdiction." 42 Pa. Cons. Stat. § 5301(a).

The trial court granted Norfolk Southern's motion to dismiss for lack of personal jurisdiction. On direct appeal, the Pennsylvania Supreme Court affirmed the trial court's decision. It reasoned that the Commonwealth's long-arm statute "compelled submission to general jurisdiction by legislative command," and "impermissibly conditioned the privilege of doing business in Pennsylvania upon a foreign corporation's surrender of its constitutional right to due process." Mallory filed a petition for certiorari and we granted review on whether it is permissible under the Fourteenth Amendment's Due Process Clause for Pennsylvania to require an out-of-state corporation to submit to personal jurisdiction as a condition of doing business there.

II

Before proceeding, it is important to establish the narrow grounds on which Mallory asserts Norfolk Southern is subject to Pennsylvania's general personal jurisdiction. Mallory argues that Norfolk Southern *consented* to general jurisdiction under Pennsylvania's long-arm statute, 42 Pa. Cons. Stat. § 5301(a)(2), by registering to do business in the Commonwealth. Mallory does not argue that Norfolk Southern is subject to Pennsylvania's general jurisdiction through the traditional "at home" analysis. *See Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (citing *International Shoe v. Washington*, 326 U.S. 310, 317

(1945)) (“[a] court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so ‘continuous and systematic’ as to render them essentially *at home* in the forum State) (emphasis added).

We, therefore, limit the scope of our opinion to the question presented of whether the consent-by-registration portion of Pennsylvania’s long-arm statute is constitutional under the Fourteenth Amendment’s Due Process Clause. We refrain from commenting on whether general jurisdiction can be asserted over Norfolk Southern because its affiliations with Pennsylvania were so continuous and systematic as to render it essentially at home there.

III

To begin our analysis, we examine Pennsylvania’s consent-by-registration statutory scheme to determine whether an out-of-state corporation’s consent can qualify as *voluntary*. If Norfolk Southern’s consent to Pennsylvania’s general personal jurisdiction was voluntary, then its procedural due process right is considered waived and our inquiry ends. *See Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982) (“because the requirement of personal jurisdiction represents first of all an individual right, it can, like other such rights, be waived”).

The mandatory language of section 411(a) is plain enough: a foreign corporation “may not do business” in Pennsylvania until it registers. 15 Pa. Cons. Stat. § 411(a). Section 411(b) extinguishes any doubt whether a foreign corporation must register to do business by imposing a penalty on those that do not: a foreign corporation that fails to register “may not maintain an action or proceeding in [Pennsylvania].” 15 Pa. Cons. Stat. § 411(b). Pennsylvania’s long-arm statute, under section 5301(a)(2)(i), asserts general jurisdiction over any registered foreign

corporation. 42 Pa. Cons. Stat. § 5301(a)(2)(i). Section 403(a) operates as a sort of exception to section 411(a), listing various activities that do not constitute doing business, one of which is “doing business in interstate . . . commerce.” 15 Pa. Cons. Stat. § 403(a).

The statutory scheme’s plain meaning dictates a compulsory consent-by-registration that does not afford an interstate business such as Norfolk Southern the option to not consent to jurisdiction. Under the statutory scheme, an interstate railroad company like Norfolk Southern has two legal options: register and be subject to a blanket assertion of Pennsylvania’s jurisdiction, or avoid doing business in Pennsylvania. The latter is not only impractical and unrealistic considering the nature of Norfolk Southern’s business as an interstate railroad company, but this Court has also long held that “the right to engage in interstate commerce is not the gift of a state.” *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 535 (1949).

The interstate commerce exception in section 403(a) cannot be deemed to practically apply to an interstate railroad company like Norfolk Southern, or for that matter to most modern-day national corporations whose interstate and intrastate business matters are invariably linked. As a result, we hold that Pennsylvania’s consent-by-registration statutory scheme is compulsory, so that Norfolk Southern’s consent was not voluntary. Therefore, Norfolk Southern did not waive its right to procedural due process under the Fourteenth Amendment.

Mallory’s claim that under the original public meaning of the due process clause, consent to jurisdiction was voluntary and valid when required as a condition of doing business in a state is not persuasive. Most of the ratification era statutes that Mallory offers to support his claim required corporations operating within a state to appoint an agent to receive service of process within the state. The distinction here, is that Pennsylvania’s statutory scheme explicitly asserts “general personal jurisdiction” over any registered out-of-state corporation as a condition of

doing business within the state. As we later demonstrate in part IV of this opinion, that distinction is important in the context of how the Court’s analysis of personal jurisdiction has evolved since the Fourteenth Amendment’s ratification.

Even if Mallory’s claim were correct—that the original public meaning of the Fourteenth Amendment’s Due Process clause supports Pennsylvania’s consent-by-registration statutory scheme—the assertion is not dispositive because the due process analysis does not conclude with an examination of the Fourteenth Amendment’s original public meaning. Whether a state’s exercise of personal jurisdiction is consistent with due process depends on whether the state has violated “traditional notions of fair play and substantial justice.” *Burnham v. Superior Ct. of Cal., County of Marin*, 495 U.S. 604, 609 (1990) (Scalia, J.) (plurality opinion) (quoting *International Shoe*, 326 U.S. at 316). And as Justice Scalia explains in *Burnham*’s plurality opinion, “*traditional* notions of fair play and substantial justice . . . [are] satisfied if a state court adheres to jurisdictional rules that are generally applied and have always been applied.” *Id.* at 623 (emphasis in original).

In *Burnham*, the jurisdictional principle at issue—that a state has jurisdiction over an individual defendant physically present in the state at the time of service of process (“transient” jurisdiction)—was both firmly approved by tradition and generally favored by contemporary state laws. *Id.* at 622. This is precisely why Mallory’s original public meaning argument is irrelevant. Even if Mallory’s contention that the Fourteenth Amendment’s original public meaning supported Pennsylvania’s consent-by-registration statute were correct, it does not necessarily follow that consent-by-registration statutes are both firmly approved by tradition *and* generally favored by contemporary state laws. In fact, the opposite is true. Pennsylvania is the lone state whose statutes still assert jurisdiction based on registration. Tanya J. Monestier,

Registration Statutes, General Jurisdiction, and the Fallacy of Consent, 36 Cardozo L. Rev.

1343, 1366 (2015). Therefore, Pennsylvania’s consent-by-registration statutory scheme does not necessarily comport with traditional notions of fair play and substantial justice, regardless of whether the scheme is grounded in the original public meaning of the Fourteenth Amendment.

IV

Mallory asserts that Pennsylvania’s consent-by-registration statutory scheme for maintaining general jurisdiction over an out-of-state corporation is supported by *Pennsylvania Fire Insurance Co. of Philadelphia v. Gold Issue Mining & Milling Co.*, 243 U.S. 93 (1917). In *Pennsylvania Fire*, this Court affirmed the right of a state to obtain personal jurisdiction over an out-of-state corporation by requiring the out-of-state corporation to appoint an in-state agent to accept service of process there.¹ 243 U.S. at 94–95; *see also* *Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 174–175 (1939) (holding an out-of-state corporation may be subject to the forum state’s jurisdiction when the out-of-state corporation named a statutory agent for the purpose of receiving service of process as required by the forum state’s laws).

Pennsylvania Fire’s applicability here, must be assessed with an understanding of how the Court’s jurisdictional framework has evolved since that case was decided. In *Pennsylvania Fire*, the Court’s analysis was operating under the territorial approach to jurisdiction. 243 U.S. at 96 (“[i]f the business out of which the action arose had been local, it was admitted that the service would have been good, and it was said that the corporation would be presumed to have

1. In *Pennsylvania Fire*, the defendant insurance company’s principal place of business was in Arizona. 243 U.S. at 94. The defendant insurance company was sued in the state of Missouri over an insurance policy it issued in Colorado. *Id.* The insurance company argued that its due process was violated under the Fourteenth Amendment when Missouri asserted its jurisdiction over the company for a policy that was issued outside of the state. *Id.* at 94–95. The Court held the insurance company consented to jurisdiction in the state of Missouri when it appointed an agent to accept service of process there, as required by Missouri law. *Id.* at 95.

assented”). The territorial approach to jurisdiction is traditionally illustrated by *Pennoyer v. Neff*, 95 U.S. 714, 720 (1878), where the personal jurisdictional analysis was limited to a defendant’s presence within the geographic bounds of a forum state. The territorial approach to jurisdiction deemed any state’s attempt to exercise authority beyond its own borders as “an illegitimate assumption of power.”² *Id.* at 720.

Four years after *Pennoyer*, the Court in *St. Clair v. Cox*, 106 U.S. 350, 355 (1882), addressed the issue of personal jurisdiction over corporations who were “incorporated under the laws of one state,” but carried on their “most extensive operations in other states.” Under the territorial framework, an out-of-state corporation could only be subject to the forum state’s jurisdiction if an agent of the corporation properly received service of process within the forum state. *Id.* at 353–54. The Court considered the “great increase in the number of corporations” and the “immense extent of their business” and acknowledged the “manifest injustice” that resulted from interstate corporations that were in effect exempt from jurisdiction outside of their state of incorporation. *Id.* at 355. In addressing that “manifest injustice,” the Court explained that a state could require an out-of-state corporation to appoint an in-state agent to receive service of process as a condition of doing business within the state. *Id.* at 356.

As interstate commerce grew and technology advanced methods of transportation and communication, the strict territorial approach illustrated in *Pennoyer* became less rigid. *Burnham*, 495 U.S. at 617 (Scalia, J.) (plurality opinion). The “canonical opinion” that defines

2. *Pennoyer* acknowledged “two well established principles of public law” under the territorial approach to personal jurisdiction. 95 U.S. at 722. The first principle, was that “every State possesse[d] exclusive jurisdiction and sovereignty over persons and property within its territory.” *Id.* The consequence of this principle was that “every State ha[d] the power to determine . . . the civil status and capacities of its inhabitants.” *Id.* (emphasis omitted). The second principle was “that no State can exercise direct jurisdiction and authority over persons or property without its territory.” *Id.*

this Court's departure from *Pennoyer*'s rigid territorial approach to jurisdiction is *International Shoe*. *Goodyear*, 564 U.S. at 923. In *International Shoe*, an out-of-state corporation's shoe salesmen were engaged in soliciting business within the forum state of Washington. 326 U.S. at 313. The Court held that the state of Washington constitutionally asserted jurisdiction over the out-of-state corporation based on the suit having arisen from the activities of its salesmen within the state. *Id.* at 321. This sort of personal jurisdiction based on in-state activities of the out-of-state corporation which had "not only been continuous and systematic, but also g[a]ve rise to the liabilities sued on" is today known as specific jurisdiction. *Daimler AG v. Bauman*, 571 U.S. 117, 126 (quoting *International Shoe*, 326 U.S. at 317).

Yet, *International Shoe* did more than just establish the concept of specific jurisdiction. It also laid the foundation for what is now known as general jurisdiction—the type referenced by Pennsylvania's consent-by-registration statutory scheme. *International Shoe* explains that general jurisdiction is constitutional when a corporation's operations within a state are "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." 326 U.S. at 318. But whether the issue is one of specific or general jurisdiction, *International Shoe* underpins the jurisdictional analysis with the notion of reasonableness³:

Since the corporate personality is a fiction . . . it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by [its agents] . . . [Due Process] may be met by such contacts of the corporation with the [forum state] as make it

3. Reasonableness has traditionally not been invoked as a separate "prong" of the general jurisdictional analysis. *Daimler*, 571 U.S. at 144 (J. Sotomayor concurring) ("all of the cases in which we have applied the reasonableness prong have involved specific as opposed to general jurisdiction"). However, it is undeniable that an element of reasonableness does not support every general jurisdictional analysis, at least in principle. See, e.g., *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445 (1952) ("[t]he essence of the issue here, at the constitutional level, is a like one of general fairness to the corporation"); *Goodyear*, 564 U.S. at 924 ("the paradigm forum for the exercise of general jurisdiction is . . . one in which the corporation is *fairly* regarded as at home") (emphasis added).

reasonable, in the context of our federal system of government, to require the corporation to defend [itself] there.

326 U.S. at 317 (emphasis added). It is not *reasonable* to allow an out-of-state plaintiff (Mallory) to sue an out-of-state defendant (Norfolk Southern) over an injury that also occurred out-of-state. The Due Process clause protects against a state asserting personal jurisdiction over an individual or corporate defendant “with which the state has no contacts, ties, or relations.” *Id.* at 319.

International Shoe’s progeny further indicate that *Pennsylvania Fire* is a bygone artifact of the *Pennoyer* era. In *Shaffer v. Heitner*, 433 U.S. 186, 209 (1977), the express purpose of the state statute at issue was to assert personal jurisdiction over a defendant whose property had been sequestered by the state. The Court ruled the statute a violation of due process and thus, overruled the *Pennoyer*-era application of quasi-in-rem jurisdiction absent minimum contacts. *Id.* at 216. The Court reasoned that “[i]n such cases, if a direct assertion of personal jurisdiction over the defendant would violate the Constitution, it would seem that an indirect assertion of that jurisdiction should be equally impermissible.” *Id.* at 209. The Court concluded by stating “all assertions of state-court jurisdiction must be evaluated according to the standards set forth in [*International Shoe*] and its progeny.” *Id.* at 212. The rule from *Shaffer* is self-evident—a state law that indirectly asserts jurisdiction over a defendant that otherwise would not be subject to that state’s personal jurisdiction under the modern framework violates the Due Process clause. Here, Pennsylvania’s consent-by-registration statutory scheme indirectly asserted general jurisdiction over Norfolk Southern, a defendant that would not have otherwise been subject to

Pennsylvania's general jurisdiction under the modern framework set forth in *International Shoe* and its progeny.⁴

Although the issue of consent-by-registration to general jurisdiction was not present in the facts of *Goodyear* or *Daimler*, both cases are instructive as to how the scope of general jurisdiction has been narrowed when viewed through the lens of the modern jurisdictional framework.

In *Goodyear*, the Court noted that since *International Shoe*, the “‘centerpiece of modern jurisdictional theory’ has been specific jurisdiction, whereas ‘general jurisdiction plays a reduced role.’” 564 U.S. at 925 (quoting Twitchell, *The Myth of General Jurisdiction*, 101 Harv. L. Rev. 610, 628 (1988)). The “paradigm forum” for exercising general jurisdiction over a corporation is its place of incorporation and principal place of business where it can be regarded as “at home.” *Id.* at 924. The Court warned against a “*sprawling* view of general jurisdiction” where “any substantial manufacturer or seller of goods would be amenable to suit, on any claim for relief, where its products are distributed.” *Id.* at 929 (emphasis added). That resistance to a *sprawling* view of general jurisdiction is especially relevant here, because permitting states to exercise general jurisdiction through compulsory registration could subject national corporations to general jurisdiction in multiple states without consideration of the minimum contacts required for traditional notions of fair play and substantial justice.

4. Again, Mallory does not argue Norfolk Southern is subject to Pennsylvania's general jurisdiction under the modern framework's contacts-based analysis. *See Perkins*, 342 U.S. at 446 (holding a foreign corporation engaged in corporate headquarters type activity that was “sufficiently substantial and of such a nature” as to allow the forum state to assert general jurisdiction even “where the cause of action arose from activities entirely distinct from [the corporation's] activities there). Mallory's only contention for Pennsylvania's jurisdiction over Norfolk Southern is under the Commonwealth's consent-by-registration statutory scheme. Therefore, in applying the rule from *Shaffer*, we assume Norfolk Southern would not be subject to general jurisdiction based on whether it had sufficient minimum contacts with the Commonwealth.

In *Daimler*, the Court reiterated that general jurisdiction occupies a “less dominant” role than specific jurisdiction in the post-*International Shoe* modern framework. 571 U.S. at 133. The basis for general jurisdiction is to “afford plaintiffs recourse to at least one clear and certain forum in which a corporate defendant may be sued on any and all claims.” *Id.* at 137. To hold compulsory consent-by-registration schemes constitutional would instead afford plaintiffs recourse on any and all claims in any state that imposes personal jurisdiction as a condition of doing business there. The Fourteenth Amendment’s Due Process Clause protects against such sprawling assertions of general jurisdiction.

To be sure, the paradigm forum for exercising general jurisdiction is not necessarily limited to the state where a company is legally incorporated. See *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446 (1952) (holding the quality and nature of the foreign corporation’s business activity within the forum state were enough to subject it to the forum state’s jurisdiction, even though the cause of action arose from activities entirely distinct from the foreign corporation’s activities there). And this Court’s overruling of *Pennsylvania Fire* today does not invalidate all manner of asserting jurisdiction by consent. See, e.g., *Ins. Corp. of Ireland*, 456 U.S. at 703 (holding that various forms of express and implied consent to jurisdiction do not violate the Due Process clause). But the lesson from *Daimler* regarding general jurisdiction in the modern framework is clear: “[a] corporation that operates in many places can scarcely be deemed at home in all of them.” 571 U.S. at 139, n.20. Therefore, Pennsylvania’s consent-by-registration scheme, when taken to its logical conclusion, does not withstand the most basic scrutiny of common sense in the modern framework’s context. For if every state were to impose a similar compulsory consent-by-registration statutory scheme, an

interstate company like Norfolk Southern would be deemed “at-home” in all of them—thereby rendering the modern framework of personal jurisdiction entirely irrelevant.

In claiming that *Pennsylvania Fire* remains valid precedent, Mallory misinterprets the holdings of *International Shoe* and its progeny by arguing those cases “*extended* jurisdiction based on contacts over *non*-consenting defendants.” Pet. Brief 29. In actuality, the modern jurisdictional framework, beginning with *International Shoe*’s fundamental discussion of minimum contacts, invalidates the *Pennoyer*-era framework for territorial jurisdiction, including the type of compulsory consent-by-registration laws contemplated by *Pennsylvania Fire*.

The evolution of the modern framework demonstrates that the consent-by-registration statutes contemplated in *Pennsylvania Fire* are limited to the territorial framework for jurisdiction exemplified in *Pennoyer*, which has since been overruled. The very purpose of the consent-by-registration statutes from the *Pennoyer* era was to ensure a corporation had a physical presence in the form of an agent to receive service of process within the boundaries of the forum state. *See Pennsylvania Fire*, 243 U.S. at 95–96 (explaining that a forum state may assert jurisdiction over a local business, but an out-of-state business required a statutory agent to receive service of process); *see also Neirbo Co.*, 308 U.S. at 169–170 (explaining that it had been “intolerable” for out-of-state corporations to be “immune[e] from suit in the states of their activities . . . so they were required by legislatures to designate agents for service of process in return for the privilege of doing local business”).

A physical presence in the form of an agent to receive service of process is no longer required to assert personal jurisdiction under the minimum contacts approach introduced by *International Shoe*. The consent-by-registration laws at issue in *Pennsylvania Fire* were upheld because the Court was using a framework to analyze personal jurisdiction that is no longer

applicable. When analyzed under the modern framework for personal jurisdiction, the consent-by-registration laws upheld in *Pennsylvania Fire* are anachronistic and do not withstand scrutiny under traditional notions of fair play and substantial justice.

The holding of *Pennsylvania Fire*, insofar as it permits a state to impose a compulsory consent-by-registration statutory scheme, is incompatible with the modern jurisdictional framework. Likewise, the portions of Pennsylvania's long-arm statutory scheme that subject out-of-state corporations to general jurisdiction as a condition of doing business within the Commonwealth are unconstitutional under the Fourteenth Amendment's Due Process Clause.

* * *

For the reasons stated, we affirm the order of the Pennsylvania Supreme Court.

It is so ordered.

PHILIP H. FONS(414) 217-0666 | philip.fons@marquette.edu

WRITING SAMPLE #2

The writing sample below is also from the course Seminar: Supreme Court. Our final assignment for the course was to write a dissenting opinion. I chose to write a dissent from the Arizona Supreme Court's unanimous opinion in *State v. Cruz*, 251 Ariz. 203 (2021).

In *Cruz*, the Arizona Supreme Court refused to grant collateral review of Cruz's capital sentence. 251 Ariz. at 204. Cruz sought review under Arizona Rule of Criminal Procedure 32.1(g), which allows for collateral review when there is a significant change in the law that would probably overturn one's judgment or sentence. *Id.* Cruz was not allowed to inform the sentencing jury that he was parole ineligible before the jury ultimately sentenced him to death in 2005. *Id.* at 206. Cruz argued that eleven years later, the United States Supreme Court in *Lynch v. Arizona*, 578 U.S. 613 (2016) (per curiam), overturned Arizona precedent that had been erroneously denying defendants the ability to inform the jury of their parole ineligibility. *Id.* Nevertheless, the Arizona Supreme Court in *Cruz* denied collateral review, reasoning that *Lynch* was not a significant change in the law as contemplated by Rule 32.1(g), but instead a significant change in the *application* of the law. 251 Ariz. at 207 (emphasis in original).

My dissenting opinion below argues that the Arizona Supreme Court's opinion in *State v. Cruz* is a novel interpretation of its Rule 32.1(g). Therefore, the Arizona Supreme Court's novel interpretation was not adequate because a state rule applying a federal claim must be firmly established and regularly followed. I submitted my dissenting opinion in December of 2022. In February of 2023, the United State Supreme Court overruled the Arizona Supreme Court in *Cruz v. Arizona*, 143 S. Ct. 650 (2023) on the grounds that its application of Rule 32.1(g) was novel and, thus, not adequate.

IN THE
SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA,
Plaintiff/Respondent,

v.

JOHN MONTENEGRO CRUZ,
Defendant/Petitioner.

No. CR-17-0567-PC

Appeal from the Superior Court in Pima County
The Honorable Joan L. Wagener, Judge
No. CR2003-1740

AFFIRMED

JUSTICE FONS, dissenting.

The Court today refuses to examine the merits of Mr. Cruz’s request for post-conviction relief because it has decided a “significant change in the law” under Arizona Rule for Criminal Procedure 32.1(g) does not encompass a “significant change in the application of the law.” Ante at 7. That arbitrary distinction is a novel interpretation of Rule 32.1(g). There is no Arizona state law precedent that supports how the majority interprets Rule 32.1(g) today. And because the majority’s interpretation is novel, it fails to pass scrutiny under the long-held United States Supreme Court precedent that a state procedural rule applying a federal claim must be firmly established and regularly followed. *Beard v. Kindler*, 558 U.S. 53, 60 (2009); *see also Lee v. Kemna*, 534 U.S. 362, 376 (2002) (a “violation of [a] firmly established and regularly followed state rule[] . . . will be adequate to foreclose a review of a federal claim”).

First, we must begin with an examination of how this Court interprets Rule 32.1(g). This Court has explained that a significant change in the law under Rule 32.1(g) requires “some transformative event, a ‘clear break’ from the past.” *State v. Shrum*, 203 P.3d 1175, 1178 (Ariz. 2008) (quoting *State v. Slemmer*, 823 P.2d 41, 49 (Ariz. 1991)). A “clear break from the past” is determined by considering both the decision purported to change the law and “the law that existed at the time a criminal defendant was sentenced.” *State v. Bigger*, 492 P.3d 1020, 1029 (Ariz. 2021). The “archetype” of a Rule 32.1(g) change in the law “occurs when an appellate court overrules previously binding case law.” *Shrum*, 203 P.3d at 1178; *see also Bigger*, 492 P.3d at 1029. None of our cases interpreting Rule 32.1(g) speak of a distinction between a change in the law and a change in the *application* of the law.

When this Court’s precedent explaining Rule 32.1(g) is applied to Mr. Cruz’s petition for review, the result is obviously a “significant change in the law.” In *Lynch v. Arizona*, 578 U.S. 613 (2016), the United State Supreme Court overruled our precedent that due process did not entitle Arizona’s capital defendants to inform a jury of their parole ineligibility. The Supreme Court’s ruling in *Lynch* was not merely an overruling of a singular case in which an Arizona defendant was erroneously denied his due process right to inform the jury of his parole ineligibility. *Lynch* was an overruling of Arizona precedent that had been ongoing for many years. *See, e.g., State v. Benson*, 307 P.3d 19, 32 (Ariz. 2013) (holding that a defendant’s request to inform the jury of his parole ineligibility was at the trial court’s discretion). Therefore, *Lynch* meets the criteria of being a “transformative event” that resulted in a “clear break from the past.”

Furthermore, *Lynch* fits this Court’s description of an archetype change in the law under Rule 32.1(g), which occurs when an appellate court overrules previously binding case law. In *Lynch*, the appellate court—the Supreme Court of the United States—overruled Arizona’s

previously binding case law which held a capital defendant was not constitutionally entitled to notify the jury of his parole ineligibility. The majority incomprehensibly states that “the Supreme Court’s decision in [*Lynch*] did not change any interpretation of federal constitutional law.” *Ante* at 8. That statement is flat out wrong. It is undeniable that the Supreme Court’s decision in *Lynch* changed Arizona’s interpretation of federal constitutional law.

The majority uses *Shrum* to show that its interpretation of Rule 32.1(g) is consistent with state precedent. *Ante* at 8. But in *Shrum*, the law at issue was an Arizona statute. 203 P.3d at 1177. And the defendant in *Shrum* argued that a significant change in the law had occurred when an Arizona court of appeals overruled a trial court’s interpretation of the statute at issue. *Id.* at 1179. The majority’s comparison to *Shrum* goes too far. It is hardly analogous to compare *Shrum*—a trial court’s singular misinterpretation of an Arizona statute—to *Lynch*, where this Court’s long-standing precedent that *Simmons* did not apply in Arizona was overruled by the United States Supreme Court.

The majority’s comparison to *Shrum* becomes even more puzzling when it cites *Shrum*’s reasoning. As the majority correctly points out, *Shrum* rejected the defendant’s argument by explaining that “the Arizona court of appeals did not change any interpretation of Arizona constitutional law, the statute at issue did not change between the petitioner’s crime and petition for relief, and no precedent was overruled, all of which meant ‘the law remained precisely the same.’” *Ante* at 8 (citing *Shrum*, 203 P.3d at 1179). That explanation is not congruous with what occurred in *Lynch*. In *Lynch*, the United States Supreme Court changed Arizona’s interpretation of federal constitutional law by overruling Arizona precedent, which meant the law in Arizona was significantly changed.

The majority's novel decision today inadvertently discriminates against the decisions of the United States Supreme Court by failing to account for a basic premise of constitutional law. As Justice Scalia explained in *American Trucking Associations v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J. concurring), "the Constitution does not change from year to year." And because the Constitution itself does not change, it follows that every Supreme Court decision can only be a change (or affirmation) in how the Constitution is applied, not a change in the Constitution itself. Under the majority's hyper-literal interpretation of Rule 32.1(g), no change in how the United State Supreme Court interprets the Constitution could ever fall under Rule 32.1(g)'s requirement of a significant change in the law. Surely, the majority does not intend this result, which would clearly discriminate against federal law.

By drawing an arbitrary distinction between "a significant change in the law" and "a significant change in the *application* of the law," the majority continues this Court's inexplicable (and ill-fated) pattern of contradicting federal law when it comes to upholding the Constitutional rights of Arizona criminal defendants. Six years after the United States Supreme Court issued its summary reversal in *Lynch* of our decision to deny a criminal defendant due process under *Simmons*, we again fail to afford our citizens the rights guaranteed to them by the United States Constitution.

For these reasons, I respectfully dissent.

Applicant Details

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 Middle Initial **K**
 Last Name **Fox**
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Zip
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Country
United States

Contact Phone Number **8058278282**

Applicant Education

BA/BS From **Washington University in St. Louis**
 Date of BA/BS **January 2021**
 JD/LLB From **Washington University School of Law**
http://www.nalplawschoolsonline.org/ndlsdir_search_results.asp?lscd=42604&yr=2014
 Date of JD/LLB **May 24, 2024**
 Class Rank **5%**
 Law Review/Journal **Yes**
 Journal(s) **Washington University Law Review**
 Moot Court Experience **Yes**
 Moot Court Name(s) **National Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	Yes
Post-graduate Judicial Law Clerk	No

Specialized Work Experience

Recommenders

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Magarian, Gregory
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

EMILY FOX

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June 12, 2023

The Honorable Michael Brennan
U.S. Court of Appeals for the Seventh Circuit
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Dear Judge Brennan:

I am a rising third-year law student at Washington University School of Law, where I am ranked seventh in my class, an articles editor of the *Washington University Law Review*, and a member of the National Moot Court Team. I am writing to express my continued interest in a clerkship in your chambers beginning in 2024.

I believe my legal coursework, together with my background in research and textual analysis, will enable me to provide high-quality work efficiently. As the only primary Jewish Studies major in the Class of 2021 at Washington University, I was challenged by my professors to understand diverse viewpoints, have deep textual conversations one-on-one, and conduct in-depth research on niche topics. My position as a summer associate at Bryan Cave Leighton Paisner requires me to conduct various legal research and writing projects efficiently and effectively communicate my work products to assigning associates and partners. In addition, since ninth grade, my time as a student-athlete has taught me how to excel with a busy schedule from six in the morning until eight in the evening each day.

I am specifically interested in a clerkship on the Seventh Circuit because of the increased amount of oral argument heard by the court each term. Allowing all litigants with lawyers to argue before the court aligns with my belief that it is crucially important to respect all litigants. I would love the opportunity to help you prepare for these arguments and gain immense observation experience to prepare for my career in private practice. My time on the National Moot Court team has given me experience in oral advocacy. At the William B. Spong Moot Court tournament, I argued in the finals before nine sitting judges. This was a great experience to learn how to get my argument across while having to address the questions of nine different individuals. I will continue to grow my advocacy skills as a participant in WashU's Wiley Rutledge Moot Court tournament and as a returning member of the National Moot Court team. I will also have the opportunity to gain advocacy experience working as a student attorney for the Washington University Intellectual Property Clinic in the Spring of 2024.

My time as an articles editor on the WashU Law review as taught me how to sift through arguments to discern pieces worthy of publication. I was responsible for reading approximately fifty articles a week and discussing the merits of these articles with my team twice a week. These

conversations were extremely helpful in growing my intellectual empathy skills and attention to facets of arguments I may not have caught myself. Additionally, my commitments as an articles editor challenged me to hone in my time management skills further as I balanced these responsibilities with moot court, my courses, finalizing my note for publication consideration, and swimming on the WashU Club Swim National team. I believe each of these skills has prepared me to succeed as a law clerk in your chambers.

Included with this application please find my résumé, undergraduate and law school transcript, and two writing samples. The first writing sample is an adaptation from the topic of an appellate brief that I completed during my Legal Practice II: Advocacy course. The second writing sample is the note I submitted for publication consideration at the *Washington University Law Review*. The letters of recommendation have been submitted by the following individuals.

Prof. Daniel Epps WashULaw epps@wustl.edu (314)-935-3532	Prof. Greg Magarian WashULaw gpmagarian@wustl.edu u (314)-935-3394	Prof. Rachel Sachs WashULaw rsachs@wustl.edu (314)-935-8557	Ariel Blask Judicial Clerk for the Honorable Raymond Gruender ariel_blask@ca8.uscourts.gov
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Thank you in advance for your time and consideration. Please do not hesitate to contact me if I can provide you with additional information. I would greatly appreciate any opportunity to interview with you.

Sincerely,



Emily Fox

EMILY FOX

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EDUCATION

Washington University School of Law St. Louis, MO
Juris Doctor Candidate | GPA: 3.94 | Rank: 7/293 May 2024

Honors & Activities:

Dean's Fellow Federalist Society
Sports and Entertainment Law Society Honor Scholar Award Recipient
Washington University Law Review, vol. 101, Articles Editor
National Moot Court Team, Member: 2023 William B. Spong Competition Runner-up, Best Respondent Brief Award

Washington University in St. Louis St. Louis, MO
Bachelor of Arts in Jewish, Islamic, and Middle Eastern Studies | GPA: 3.89 Jan. 2021

Honors Thesis: *Cultural Symbiosis: How the Jews of Colonial New York Embraced the Early American Spirit*

Honors & Activities:

Dean's List (6 Semesters) Konig Prize in Law & History
Theta Alpha Kappa Varsity Swimming
Club Swimming, Coach, Treasurer Club Rowing, Recruitment Chair

PUBLICATIONS

Fairness for All? The Implications of Adopting a Third-Gender Category in Elite Sports, 101 WASH. U. L. REV. ____ (2023) (forthcoming).

EXPERIENCE

United States Court of Appeals, Eighth Circuit St. Louis, MO
Judicial Extern for the Honorable Judge Raymond Gruender Aug. 2022 – Dec. 2022

- Assist law clerks in various tasks, including evaluating petitions for rehearing and researching legal questions for bench memos and court opinions.
- Wrote first draft of various opinions on matters including sentencing, contract disputes, and Rule 11 sanctions.

Bryan Cave Leighton Paisner, LLP St. Louis, MO
Summer Associate May 2022 – Aug. 2022, offer to return summer 2023

- Conducted legal research and writing for various transactional and litigation projects primarily in the anti-doping sports group and appellate litigation groups.
- Gained in-house experience with client Peabody Energy.

Washington University in St. Louis St. Louis, MO
Research Assistant for Professor Greg Magarian May 2023 – Aug. 2023

- Compile legal research for Prof. Magarian's upcoming projects focusing on the Second Amendment from a First Amendment perspective.

Teaching and Research Assistant for Professor Lee Epstein Jan. 2021 – May 2022

- Wrote an introductory lecture on Justice Sonia Sotomayor before she spoke to Prof. Epstein's undergraduate course: Topics in Politics: Free Speech on Campus.
- Collected a database of state supreme court justices' information to be used as the basis for a study on the impact of diversity in the court system.
- Assisted students in understanding course materials, developed questions for exams, and graded exams for the undergraduate course: Constitutional Law: Institutional Powers and Restraints.

Hillel at Washington University in St. Louis St. Louis, MO
Development Intern Feb. – Aug. 2022

- Compiled alumni records, coordinated fundraising efforts and alumni outreach, and assisted with student engagement events.

COMMUNITY ENGAGEMENT & INTERESTS

Washington University in St. Louis Varsity Swim Team, Assistant Coach | Yoga | Alternative Rock Music



Washington University in St. Louis

Office of the University Registrar

Page 1 of 3

Record Of: **Fox, Emily Katz**

Degrees Awarded:

Student ID Number: 456708

A.B. MAJOR IN JEWISH, ISLAMIC & NEAR EAST

STUDIES

JAN 10, 2021

GRADUATED WITH HONORS: CUM LAUDE

JAN 10, 2021

Transcript Issued 06/09/2023 To:

MINOR IN LEGAL STUDIES

JAN 10, 2021

MINOR IN RELIGION AND POLITICS

JAN 10, 2021

Current Programs Of Study:

JURIS DOCTOR

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2017

INTRODUCTION TO MICROECONOMICS

ECON L11 1011 3.0 CR#

FIRST YEAR MODERN HEBREW

HBRW L74 1011 3.0 A+

AN INTRODUCTION TO LOGIC AND CRITICAL ANALYSIS

LW ST L84 105G 3.0 A-

CLASSICAL TO RENAISSANCE LITERATURE: TEXT AND TRADITION

IPH L93 201C 3.0 A-

EARLY POLITICAL THOUGHT: TEXT AND TRADITION

IPH L93 203C 3.0 B+

Enrolled Units 15.0

Semester GPA 3.68

Cumulative Units 15.0

Cumulative GPA 3.68

Spring Semester 2018

OUT OF THE SHETL: JEWISH LIFE IN CENTRAL AND EASTERN EUROPE IN THE 19TH AND 20TH CENTURIES

HISTORY L22 3350 3.0 A-

INTRODUCTION TO CULTURAL ANTHROPOLOGY

ANTHRO L48 160B 3.0 B

ZIONISM

RELPOL L57 250 3.0 B+

COLLEGE WRITING 1

CWP L59 100 3.0 A

FIRST YEAR MODERN HEBREW

HBRW L74 1012 3.0 A+

Enrolled Units 15.0

Semester GPA 3.60

Cumulative Units 30.0

Cumulative GPA 3.63

Fall Semester 2018

INTRODUCTION TO HUMAN EVOLUTION

ANTHRO L48 150A 3.0 A-

COGNITION AND CULTURE

ANTHRO L48 3383 3.0 A

THE FBI AND RELIGION

RELPOL L57 355 3.0 A+

SECOND YEAR MODERN HEBREW

JINE L75 201D 3.0 A+

BIBLICAL LAW AND THE ORIGINS OF WESTERN JUSTICE

JINE L75 3012 3.0 A

Enrolled Units 15.0

Semester GPA 3.94

Cumulative Units 45.0

Cumulative GPA 3.74

Spring Semester 2019

RELIGION AND POLITICS IN AMERICAN HISTORY

RE ST L23 225 3.0 A

SECOND YEAR MODERN HEBREW

JINE L75 202D 3.0 A+

INTRODUCTION TO JEWISH CIVILIZATION: HISTORY AND IDENTITY

JINE L75 208F 3.0 A

BECOMING "MODERN": EMANCIPATION, ANTISEMITISM, AND NATIONALISM IN MODERN JEWISH

HISTORY

JINE L75 335C 3.0 A+

IN THE BEGINNING: CREATION MYTHS OF THE BIBLICAL WORLD

JINE L75 375W 3.0 A

Enrolled Units 15.0

Semester GPA 4.00

Cumulative Units 60.0

Cumulative GPA 3.81

Fall Semester 2019

SLAVERY, SOVEREIGNTY, SECURITY: AMERICAN RELIGIONS AND THE PROBLEM OF FREEDOM

RE ST L23 3650 3.0 A+

Keri A. Disch, University Registrar



Washington University in St. Louis

Office of the University Registrar

Page 2 of 3

Record Of: **Fox, Emily Katz**

Student ID Number: V456708

Fall Semester 2019

UNIVES CAPSTONE SEMINAR: CONVIVENCIA OR RECONQUISTA? MUSLIMS, JEWS, AND
CHRISTIANS IN MEDIEVAL IBERIA

RE ST L23 4002 3.0 A

INTRODUCTION TO DIRECTED RESEARCH

ANTHRO L48 290 1.0 A

PURITANS AND REVOLUTIONARIES: RELIGION AND THE MAKING OF AMERICA

RELPOL L57 235 3.0 A

INTRODUCTION TO BIBLICAL HEBREW

JIMES L75 3841 3.0 A

TOPICS IN JEWISH HISTORY: JEWS IN NORTH AFRICA & THE MIDDLE EAST (19TH-20TH
CENTURY)

JIMES L75 386 3.0 A

Enrolled Units 16.0 Semester GPA 4.00 Cumulative Units 76.0 Cumulative GPA 3.85

Spring Semester 2020

TOPICS IN PHYSICAL EDUCATION: VARSITY SPORTS

P.E. L28 220 1.0 CR#

SYMBOLIC LOGIC

PHIL L30 301G 3.0 A

INTRODUCTION TO DIRECTED RESEARCH

ANTHRO L48 290 1.0 A

INTRODUCTION TO ISLAMIC CIVILIZATION

JIMES L75 210C 3.0 A

TOPICS IN BIBLICAL HEBREW TEXTS: JEREMIAH

JIMES L75 385D 3.0 A

ARGUMENTATION

LW ST L84 312 3.0 A

CONSTITUTIONAL LAW: INSTITUTIONAL POWERS AND CONSTRAINTS

LW ST L84 3431 3.0 A+

Enrolled Units 17.0 Semester GPA 4.00 Cumulative Units 105.0 Cumulative GPA 3.88

Fall Semester 2020

LEGAL CONFLICT IN MODERN AMERICAN SOCIETY

POL SCI L32 3507 3.0 A-

ISLAM, GENDER, SEXUALITY

JIMES L75 362A 3.0 A

STUDY FOR HONORS IN JEWISH, ISLAMIC, AND NEAR EASTERN STUDIES

JIMES L75 499 3.0 A

TOPICS IN COMPOSITION: WRITING AND THE LAW

LW ST L84 314W 3.0 A

THE DEVELOPMENT OF THE AMERICAN CONSTITUTION

LW ST L84 3255 3.0 A

Enrolled Units 15.0 Semester GPA 3.94 Cumulative Units 120.0 Cumulative GPA 3.89

Fall Semester 2021

LEGAL RESEARCH METHODOLOGIES I

LAW W74 500D 0 CIP

LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (LEWIS)

LAW W74 500F 2.0 A

CONTRACTS (P. SMITH)

LAW W74 501A 4.0 A

PROPERTY (SACHS)

LAW W74 507W 4.0 A+

TORTS (TAMANAH)

LAW W74 515D 4.0 A+

Enrolled Units 14.0 Semester GPA 3.94 Cumulative Units 14.0 Cumulative GPA 3.94

Spring Semester 2022

LEGAL RESEARCH METHODOLOGIES II

LAW W74 500E 1.0 P

LEGAL PRACTICE II: ADVOCACY (LEWIS)

LAW W74 500G 2.0 A

CRIMINAL LAW (EPPS)

LAW W74 502Q 4.0 A+

NEGOTIATION (TOKARZ/SHIELDS)

LAW W74 503G 1.0 CR

CIVIL PROCEDURE (P. KIM)

LAW W74 506G 4.0 A

CONSTITUTIONAL LAW I (MAGARIAN)

LAW W74 520L 4.0 A

Enrolled Units 16.0 Semester GPA 3.91 Cumulative Units 30.0 Cumulative GPA 3.93

Keri A. Disch, University Registrar



Washington University in St. Louis

Office of the University Registrar

Page 3 of 3

Record Of: **Fox, Emily Katz**

Student ID Number: V 456708

Spring Semester 2022

Fall Semester 2022

LEGAL ISSUES IN SPORTS	MGT	B53 460J	1.5	A
CORPORATIONS (FRANKENREITER)	LAW	W74 538W	3.0	A-
LEGISLATION (MAGARIAN)	LAW	W74 601A	3.0	A
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	3.0	CR
FOREIGN RELATIONS LAW OF THE UNITED STATES (WATERS)	LAW	W74 725B	3.0	A+
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 14.5 Semester GPA 3.92 Cumulative Units 44.5 Cumulative GPA 3.93

Spring Semester 2023

CONFLICT OF LAWS (WATERS)	LAW	W74 536B	3.0	A
CRIMINAL PROCEDURE: INVESTIGATION (EPPS)	LAW	W74 542L	3.0	A+
EVIDENCE (ROSEN)	LAW	W74 547K	3.0	A
RELIGION AND THE CONSTITUTION (INAZU)	LAW	W74 724F	3.0	A+
NATIONAL MOOT COURT TEAM	LAW	W75 606P	1.0	CR
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 14.0 Semester GPA 3.97 Cumulative Units 58.5 Cumulative GPA 3.94

Remarks

FL2017 FROM: ADVANCED PLACEMENT WESTERN CIVILIZATION	0 UNITS
FL2017 FROM: ADVANCED PLACEMENT FREEDOM, CITIZENSHIP AND THE MAKING OF AMERICAN LIFE	0 UNITS
SP2018 FROM: ADVANCED PLACEMENT ENGLISH COMPOSITION ELECTIVE	0 UNITS
SP2020 FROM: BY PROFICIENCY POLITICAL SCIENCE ELECTIVE	0 UNITS
SP2020 FROM: TOTAL CREDIT GRANTED BY PREMATRICATION UNITS	12.0 UNITS
SP2020 SPECIAL NOTE: GIVEN THE COVID-19 DISRUPTION, DEAN'S LIST WAS NOT AWARDED DURING SPRING 2020.	
SP2020 SPECIAL NOTE: DURING THE SPRING OF 2020, A GLOBAL PANDEMIC REQUIRED SIGNIFICANT CHANGES TO COURSEWORK. UNUSUAL ENROLLMENT PATTERNS AND GRADES MAY REFLECT THE TUMULT OF THE TIME.	
FL2022 FROM: OLIN SCHOOL OF BUSINESS LAW SCHOOL ELECTIVE	1.5 UNITS

Distinctions, Prizes and Awards

SP2018 DEAN'S LIST
FL2018 DEAN'S LIST
SP2019 DEAN'S LIST
SP2019 KONIG PRIZE IN LAW AND HISTORY
FL2019 THETA ALPHA KAPPA - RELIGIOUS STUDIES HONOR SOCIETY
FL2019 DEAN'S LIST
FL2020 DEAN'S LIST
SP2021 ALEENE SCHNEIDER ZAWADA AWARD FOR OUTSTANDING STUDENTS IN JEWISH STUDIES
SP2021 DISTINCTION IN JEWISH, ISLAMIC AND MIDDLE EASTERN STUDIES
FL2021 DEAN'S LIST
SP2022 DEAN'S LIST
SP2022 HONOR SCHOLAR AWARD
FL2022 DEAN'S LIST

***** END OF TRANSCRIPT *****

Keri A. Disch
Keri A. Disch, University Registrar



Washington University in St. Louis

Office of the University Registrar

Page 1 of 3

Record Of: **Fox, Emily Katz**

Degrees Awarded:

Student ID Number: 456708

A.B. MAJOR IN JEWISH, ISLAMIC & NEAR EAST

STUDIES

JAN 10, 2021

GRADUATED WITH HONORS: CUM LAUDE

JAN 10, 2021

Transcript Issued 06/09/2023 To:

MINOR IN LEGAL STUDIES

JAN 10, 2021

MINOR IN RELIGION AND POLITICS

JAN 10, 2021

Current Programs Of Study:

JURIS DOCTOR

RECIPIENT AS DESIGNATED BY STUDENT

Fall Semester 2017

INTRODUCTION TO MICROECONOMICS

ECON L11 1011 3.0 CR#

FIRST YEAR MODERN HEBREW

HBRW L74 1011 3.0 A+

AN INTRODUCTION TO LOGIC AND CRITICAL ANALYSIS

LW ST L84 105G 3.0 A-

CLASSICAL TO RENAISSANCE LITERATURE: TEXT AND TRADITION

IPH L93 201C 3.0 A-

EARLY POLITICAL THOUGHT: TEXT AND TRADITION

IPH L93 203C 3.0 B+

Enrolled Units 15.0

Semester GPA 3.68

Cumulative Units 15.0

Cumulative GPA 3.68

Spring Semester 2018

OUT OF THE SHETL: JEWISH LIFE IN CENTRAL AND EASTERN EUROPE IN THE 19TH AND 20TH CENTURIES

HISTORY L22 3350 3.0 A-

INTRODUCTION TO CULTURAL ANTHROPOLOGY

ANTHRO L48 160B 3.0 B

ZIONISM

RELPOL L57 250 3.0 B+

COLLEGE WRITING 1

CWP L59 100 3.0 A

FIRST YEAR MODERN HEBREW

HBRW L74 1012 3.0 A+

Enrolled Units 15.0

Semester GPA 3.60

Cumulative Units 30.0

Cumulative GPA 3.63

Fall Semester 2018

INTRODUCTION TO HUMAN EVOLUTION

ANTHRO L48 150A 3.0 A-

COGNITION AND CULTURE

ANTHRO L48 3383 3.0 A

THE FBI AND RELIGION

RELPOL L57 355 3.0 A+

SECOND YEAR MODERN HEBREW

JINE L75 201D 3.0 A+

BIBLICAL LAW AND THE ORIGINS OF WESTERN JUSTICE

JINE L75 3012 3.0 A

Enrolled Units 15.0

Semester GPA 3.94

Cumulative Units 45.0

Cumulative GPA 3.74

Spring Semester 2019

RELIGION AND POLITICS IN AMERICAN HISTORY

RE ST L23 225 3.0 A

SECOND YEAR MODERN HEBREW

JINE L75 202D 3.0 A+

INTRODUCTION TO JEWISH CIVILIZATION: HISTORY AND IDENTITY

JINE L75 208F 3.0 A

BECOMING "MODERN": EMANCIPATION, ANTISEMITISM, AND NATIONALISM IN MODERN JEWISH

HISTORY

JINE L75 335C 3.0 A+

IN THE BEGINNING: CREATION MYTHS OF THE BIBLICAL WORLD

JINE L75 375W 3.0 A

Enrolled Units 15.0

Semester GPA 4.00

Cumulative Units 60.0

Cumulative GPA 3.81

Fall Semester 2019

SLAVERY, SOVEREIGNTY, SECURITY: AMERICAN RELIGIONS AND THE PROBLEM OF FREEDOM

RE ST L23 3650 3.0 A+

Keri A. Disch, University Registrar



Washington University in St. Louis

Office of the University Registrar

Page 2 of 3

Record Of: **Fox, Emily Katz**

Student ID Number: V456708

Fall Semester 2019

UNIVES CAPSTONE SEMINAR: CONVIVENCIA OR RECONQUISTA? MUSLIMS, JEWS, AND
CHRISTIANS IN MEDIEVAL IBERIA

RE ST L23 4002 3.0 A

INTRODUCTION TO DIRECTED RESEARCH

ANTHRO L48 290 1.0 A

PURITANS AND REVOLUTIONARIES: RELIGION AND THE MAKING OF AMERICA

RELPOL L57 235 3.0 A

INTRODUCTION TO BIBLICAL HEBREW

JIMES L75 3841 3.0 A

TOPICS IN JEWISH HISTORY: JEWS IN NORTH AFRICA & THE MIDDLE EAST (19TH-20TH
CENTURY)

JIMES L75 386 3.0 A

Enrolled Units 16.0 Semester GPA 4.00 Cumulative Units 76.0 Cumulative GPA 3.85

Spring Semester 2020

TOPICS IN PHYSICAL EDUCATION: VARSITY SPORTS

P.E. L28 220 1.0 CR#

SYMBOLIC LOGIC

PHIL L30 301G 3.0 A

INTRODUCTION TO DIRECTED RESEARCH

ANTHRO L48 290 1.0 A

INTRODUCTION TO ISLAMIC CIVILIZATION

JIMES L75 210C 3.0 A

TOPICS IN BIBLICAL HEBREW TEXTS: JEREMIAH

JIMES L75 385D 3.0 A

ARGUMENTATION

LW ST L84 312 3.0 A

CONSTITUTIONAL LAW: INSTITUTIONAL POWERS AND CONSTRAINTS

LW ST L84 3431 3.0 A+

Enrolled Units 17.0 Semester GPA 4.00 Cumulative Units 105.0 Cumulative GPA 3.88

Fall Semester 2020

LEGAL CONFLICT IN MODERN AMERICAN SOCIETY

POL SCI L32 3507 3.0 A-

ISLAM, GENDER, SEXUALITY

JIMES L75 362A 3.0 A

STUDY FOR HONORS IN JEWISH, ISLAMIC, AND NEAR EASTERN STUDIES

JIMES L75 499 3.0 A

TOPICS IN COMPOSITION: WRITING AND THE LAW

LW ST L84 314W 3.0 A

THE DEVELOPMENT OF THE AMERICAN CONSTITUTION

LW ST L84 3255 3.0 A

Enrolled Units 15.0 Semester GPA 3.94 Cumulative Units 120.0 Cumulative GPA 3.89

Fall Semester 2021

LEGAL RESEARCH METHODOLOGIES I

LAW W74 500D 0 CIP

LEGAL PRACTICE I: OBJECTIVE ANALYSIS AND REASONING (LEWIS)

LAW W74 500F 2.0 A

CONTRACTS (P. SMITH)

LAW W74 501A 4.0 A

PROPERTY (SACHS)

LAW W74 507W 4.0 A+

TORTS (TAMANAH)

LAW W74 515D 4.0 A+

Enrolled Units 14.0 Semester GPA 3.94 Cumulative Units 14.0 Cumulative GPA 3.94

Spring Semester 2022

LEGAL RESEARCH METHODOLOGIES II

LAW W74 500E 1.0 P

LEGAL PRACTICE II: ADVOCACY (LEWIS)

LAW W74 500G 2.0 A

CRIMINAL LAW (EPPS)

LAW W74 502Q 4.0 A+

NEGOTIATION (TOKARZ/SHIELDS)

LAW W74 503G 1.0 CR

CIVIL PROCEDURE (P. KIM)

LAW W74 506G 4.0 A

CONSTITUTIONAL LAW I (MAGARIAN)

LAW W74 520L 4.0 A

Enrolled Units 16.0 Semester GPA 3.91 Cumulative Units 30.0 Cumulative GPA 3.93

Keri A. Disch, University Registrar



Washington University in St. Louis

Office of the University Registrar

Page 3 of 3

Record Of: **Fox, Emily Katz**

Student ID Number: V 456708

Spring Semester 2022

Fall Semester 2022

LEGAL ISSUES IN SPORTS	MGT	B53 460J	1.5	A
CORPORATIONS (FRANKENREITER)	LAW	W74 538W	3.0	A-
LEGISLATION (MAGARIAN)	LAW	W74 601A	3.0	A
JUDICIAL CLERKSHIP EXTERNSHIP	LAW	W74 654E	3.0	CR
FOREIGN RELATIONS LAW OF THE UNITED STATES (WATERS)	LAW	W74 725B	3.0	A+
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 14.5 Semester GPA 3.92 Cumulative Units 44.5 Cumulative GPA 3.93

Spring Semester 2023

CONFLICT OF LAWS (WATERS)	LAW	W74 536B	3.0	A
CRIMINAL PROCEDURE: INVESTIGATION (EPPS)	LAW	W74 542L	3.0	A+
EVIDENCE (ROSEN)	LAW	W74 547K	3.0	A
RELIGION AND THE CONSTITUTION (INAZU)	LAW	W74 724F	3.0	A+
NATIONAL MOOT COURT TEAM	LAW	W75 606P	1.0	CR
LAW REVIEW	LAW	W77 600S	1.0	CR

Enrolled Units 14.0 Semester GPA 3.97 Cumulative Units 58.5 Cumulative GPA 3.94

Remarks

FL2017 FROM: ADVANCED PLACEMENT WESTERN CIVILIZATION	0 UNITS
FL2017 FROM: ADVANCED PLACEMENT FREEDOM, CITIZENSHIP AND THE MAKING OF AMERICAN LIFE	0 UNITS
SP2018 FROM: ADVANCED PLACEMENT ENGLISH COMPOSITION ELECTIVE	0 UNITS
SP2020 FROM: BY PROFICIENCY POLITICAL SCIENCE ELECTIVE	0 UNITS
SP2020 FROM: TOTAL CREDIT GRANTED BY PREMATRICATION UNITS	12.0 UNITS
SP2020 SPECIAL NOTE: GIVEN THE COVID-19 DISRUPTION, DEAN'S LIST WAS NOT AWARDED DURING SPRING 2020.	
SP2020 SPECIAL NOTE: DURING THE SPRING OF 2020, A GLOBAL PANDEMIC REQUIRED SIGNIFICANT CHANGES TO COURSEWORK. UNUSUAL ENROLLMENT PATTERNS AND GRADES MAY REFLECT THE TUMULT OF THE TIME.	
FL2022 FROM: OLIN SCHOOL OF BUSINESS LAW SCHOOL ELECTIVE	1.5 UNITS

Distinctions, Prizes and Awards

SP2018 DEAN'S LIST
FL2018 DEAN'S LIST
SP2019 DEAN'S LIST
SP2019 KONIG PRIZE IN LAW AND HISTORY
FL2019 THETA ALPHA KAPPA - RELIGIOUS STUDIES HONOR SOCIETY
FL2019 DEAN'S LIST
FL2020 DEAN'S LIST
SP2021 ALEENE SCHNEIDER ZAWADA AWARD FOR OUTSTANDING STUDENTS IN JEWISH STUDIES
SP2021 DISTINCTION IN JEWISH, ISLAMIC AND MIDDLE EASTERN STUDIES
FL2021 DEAN'S LIST
SP2022 DEAN'S LIST
SP2022 HONOR SCHOLAR AWARD
FL2022 DEAN'S LIST

***** END OF TRANSCRIPT *****

Keri A. Disch
Keri A. Disch, University Registrar

Washington University in St. Louis

Office of the University Registrar

One Brookings Drive, Campus Box 1143, St. Louis, MO 63130-4899 www.registrar.wustl.edu 314-935-5959

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Transcript Nomenclature

Transcripts issued by Washington University are a complete and comprehensive record of all classes taken unless otherwise indicated. Each page lists the student's name and Washington University student identification number. Transcript entries end with a line across the last page indicating no further entries.

Degrees conferred by Washington University and current programs of study appear on the first page of the transcript. The Degrees Awarded section lists the date of award, the specific degree(s) awarded and the major field(s) of study.

Courses in which the student enrolled while at Washington University are listed in chronological order by semester, each on a separate line beginning with the course title followed by the academic department abbreviation, course number, credit hours, and grade.

Honors, awards, administrative actions, and transfer credit are listed at the end of the document under "Distinctions, Prizes and Awards" and "Remarks".

Course Numbering System

In general course numbers indicate the following academic levels: courses 100-199 = first-year; 200-299 = sophomore; 300-399 = junior; 400-500 = senior and graduate level; 501 and above primarily graduate level. The language of instruction is English unless the course curriculum is foreign language acquisition.

Unit of Credit/Calendar

Most schools at Washington University follow a fifteen-week semester calendar in which one hour of instruction per week equals one unit of credit. Several graduate programs in the School of Medicine and several master's programs in the School of Law follow a year-long academic calendar. The Doctor of Medicine program uses clock hours instead of credit hours.

Academic and Disciplinary Notations

Students are understood to be in good academic standing unless stated otherwise. Suspension or expulsion, i.e. the temporary or permanent removal from student status, may result from poor academic performance or a finding of misconduct.

Grading Systems

Most schools within Washington University employ the grading and point values in the Standard column below. Other grading rubrics currently in use are listed separately. See www.registrar.wustl.edu for earlier grading scales, notably for the School of Law, Engineering prior to 2010, Social Work prior to 2009 and MBA programs prior to 1998. Some programs do not display GPA information on the transcript. Cumulative GPA and units may not fully describe the status of students enrolled in dual degree programs, particularly those from schools using different grading scales. Consult the specific school or program for additional information.

Rating	Grade	Standard Points	Social Work
Superior	A+/A	4	4
	A-	3.7	3.7
	B+	3.3	3.3
Good	B	3	3
	B-	2.7	2.7
	C+	2.3	2.3
Average	C	2	2
	C-	1.7	1.7
	D+	1.3	0
Passing	D	1	0
	D-	0.7	0
Failing	F	0	0

Grade	Law Values (Effective Class of 2013)
A+	4.00-4.30
A	3.76-3.94
A-	3.58-3.70
B+	3.34-3.52
B	3.16-3.28
B-	3.04-3.10
C+	2.92-2.98
C	2.80-2.86
D	2.74
F	2.50-2.68

Additional Grade Notations			
AUD	Audit	NC/NCR/NCR#	No Credit
CIP	Course in Progress	NP	No Pass
CR/CR#	Credit	P/P#	Pass
E	Unusually High Distinction	PW	Permitted to Withdraw
F/F#	Fail	R	Course Repeated
H	Honors	RW	Required to Withdraw
HP	High Pass	RX	Reexamined in course
I	Incomplete	S	Satisfactory
IP	In Progress	U	Unsatisfactory
L	Successful Audit	W	Withdrawal
LP	Low Pass	X	No Exam Taken
N	No Grade Reported	Z	Unsuccessful Audit

(revised 11/2020)

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Washington University in St. Louis
SCHOOL OF LAW

June 15, 2022

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

RE: Recommendation for Emily Fox

Dear Judge Brennan:

I write to recommend my student, Emily Fox, for a clerkship in your chambers. I was fortunate to get to know Emily as a student in my Property Law class in the fall of 2021. Of all the students in that Property Law class (representing roughly 1/3 of the WashULaw 1L class), Emily has earned my highest recommendation this year. Not only did Emily excel in the class, but she impressed me with her work ethic, attention to detail, and analytical reasoning skills. I know she would be an asset to your chambers.

In Property Law, Emily participated in class often. She performed well when cold-called, and when volunteering to contribute, her comments were thoughtful and clear. She often attended office hours, and her intellectual curiosity was apparent. I assign the students a two-question in-class midterm exam halfway through the semester, and I selected Emily's answer to the first question as a model for other students due to its clarity, accuracy, and thorough analysis. I selected her answer through a process of blind review, but I was not surprised to find that it was hers.

It was also not a surprise when Emily received one of the highest grades in the class on the final exam. Out of 93 students, Emily tied with another student for third place in the class. She also received the highest score of any student on the most difficult question on the exam, a question that combined doctrinal and policy analysis regarding light projections on privately owned buildings. I selected her answer to that question (again through blind review) as the model answer for use in my memo to the students about the final exam.

Emily has thought deeply about the ways clerking would enable her to serve the broader public while also providing her with an invaluable learning experience. Emily writes that "spending a year clerking will allow me to delve deeper into understanding how the law is applied to various situations." She believes that "clerking will grant an opportunity to further engage with the study of law" by not only learning "how the law is made but being able to help write opinions myself in a way that can explain to the general public why the decision had to come out as it is." She seeks to "learn how to account for differing points of view in my writing," believing that this "will not only make me a better advocate when I embark on my long-term career in a law firm, but it will make me a better thinker and community member in helping to increase my social awareness of other people's points of view."

Emily is also someone I would enjoy being around in the context of a clerkship. As a former clerk myself, I know that compatibility between judges and their clerks and between clerks themselves is important. Emily is not just intelligent. She is also polite and thoughtful, and she would work well with you and with her colleagues.

Please let me know if you need any more information about Emily. I can be reached by email at rsachs@wustl.edu or phone at (314)-935-8557.

Best,

/s/

Rachel Sachs
Treiman Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Rachel Sachs - rsachs@wustl.edu - (314) 935-8557

Rachel Sachs - rsachs@wustl.edu - (314) 935-8557

Washington University in St. Louis
SCHOOL OF LAW

July 19, 2022

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

RE: Recommendation for Emily Fox

Dear Judge Brennan:

I am writing to recommend Emily Fox, a member of the Class of 2024 at Washington University School of Law, ranked #7 in the class, and is an editor of the Washington University Law Review, for a clerkship in your chambers. I think she'd make an outstanding law clerk and I strongly encourage you to hire her.

I got to know Emily this past spring while she was enrolled in my first-year Criminal Law course. She was one of the star performers. She was one of the most reliable students during "cold calls"; I knew that whenever I called on her, she'd be well prepared, having done the reading closely and—more importantly—having understood it on a deep level. She was also a regular contributor to class discussion; she liked getting into the weeds on doctrinal questions such as the choice between competing approaches under the common law's and the Model Penal Code's approaches to different questions of criminal liability. She also was eager to discuss the criminal law's hard questions about moral responsibility and blame. While some students approach criminal law from a very ideological perspective, her approach was nuanced and sophisticated. She understood the competing goals criminal law had to weigh and argued for crafting doctrine in a way that set the right balance.

Given her outstanding classroom performance, I was anything but surprised when Emily got a 4.12 (A+) in the class on her exam, a tie for the highest grade. The exam was demanding and designed to test the full range of material we covered. It had 50 multiple-choice questions and two essays (one a traditional issue-spotter and one designed to test policy issues). She managed to nail the whole thing, demonstrating deep knowledge of the doctrinal rules, thoughtful analysis of normative questions, good writing skills, and the ability to work well under pressure (it was a four-hour exam that many students struggled to complete). That performance was no fluke; as noted above, Emily is one of our top students at WashULaw. That's saying a lot these days—WashULaw is now the #16 law school in the country, and by the numbers our students are as strong or stronger than most top 10 schools. We've achieved that success in part through our generous use of merit scholarships, of which Emily is a recipient; that's certainly been a good investment on the school's part.

I think Emily has the skills she needs to really thrive in a judicial chambers. She loves the law and wants nothing more than the opportunity to really dig in on hard research questions. That comes from her academic passion for textual analysis which began in college when she carefully studied religious texts. She'd be exactly the kind of clerk you'd want to dig into a complex statutory scheme. She'd work hard and would try to get you the best answer to the question based on what the law—not her policy preferences—provides. She's also a person you'd really enjoy having in chambers. She came to see me during office hours over the course of the semester; I very much enjoyed her enthusiasm for the course and for the law. She has the ambition she needs to succeed at the highest echelon of her profession, and I think she's headed for great things in her career.

For these reasons, I think Emily would be a fantastic hire. Please don't hesitate to contact me via email (epps@wustl.edu) or phone (cell: 6172590109) if you have any questions about Emily's application.

Best,

/s/

Daniel Epps
Associate Professor of Law

Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420

Daniel Epps - epps@wustl.edu - (314) 935-3532

Daniel Epps - epps@wustl.edu - (314) 935-3532

Ari Blask
Judicial Law Clerk
United States Court of Appeals for the Eighth Circuit
ariel_blask@ca8.uscourts.gov

January 5, 2023

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

Re: Recommendation for Emily Fox

Dear Judge Brennan:

I write in support of Emily Fox's clerkship candidacy. I believe that she would be an excellent addition to your chambers.

I am currently working as a clerk for the Honorable Raymond W. Gruender, United States Circuit Judge. Emily externed in Judge Gruender's chambers during the fall of 2022. Emily was a superb extern. She writes persuasively, concisely, and clearly, and she ably analyzed difficult legal issues. We were able to rely on Emily to produce quality work fast. I therefore tasked her with increasingly complex assignments throughout the externship term. Emily's work included writing sections of bench memos and draft opinions. As she did so at a high quality, I am confident that she can successfully perform similar tasks in your chambers.

I also note that Emily completed her externship while taking a full slate of classes and serving as a staff editor on the Washington University Law Review. I know from experience that one of the most important traits of a successful clerk is the ability to manage competing responsibilities and go above-and-beyond when faced with challenging assignments. Emily's success in managing multiple high-pressure and challenging roles showed me that she has this trait.

Lastly, Emily is enthusiastic about the judicial process, legal analysis, and her own career in the law. That enthusiasm rubbed off on us during her externship and improved the culture in our chambers. I am confident that Emily will bring this enthusiasm to a clerkship role.

Please feel free to reach out to me if you have questions about Emily's candidacy. My personal email is ariblask@gmail.com, and my cell is 240-676-7746.

Best regards,

/S Ari Blask

Ariel Blask - ariel_blask@ca8.uscourts.gov

Washington University in St. Louis
SCHOOL OF LAW

December 20, 2022

The Honorable Michael Brennan
United States Courthouse and Federal Building
517 East Wisconsin Avenue, Room 618
Milwaukee, WI 53202

RE: Recommendation for Emily Fox

Dear Judge Brennan:

I write to recommend my student Emily Fox, Washington University School of Law class of 2024, to serve as one of your law clerks beginning in the summer or fall of 2024. Emily is a whip-smart, enthusiastic, highly engaging student. I believe she will make an outstanding law clerk and a formidable attorney.

Emily has a stellar academic record. Her sparking 1L grades placed her seventh in her class, securely in the top three percent. She did not achieve less than an A-minus in any first-year course. She serves on the *Law Review*. Her success in law school follows an equally brilliant undergraduate career here at Washington University, where she earned a 3.9 grade average while majoring in Jewish, Islamic, and Middle Eastern Studies and winning the Konig Prize in Law and History.

I have had the pleasure of teaching Emily in my first-year Constitutional Law course and my upper-level Legislation course. In Constitutional Law, she wrote one of the strongest exams in the class, getting a grade comfortably in the "A" range. That performance only confirmed my initial sense of her abilities. Early in the semester, she asked to borrow my copy of Justice Sotomayor's memoir. She explained that she needed to write a lecture to introduce Justice Sotomayor, who was visiting our campus and speaking to an undergraduate constitutional law class, taught by my eminent colleague Lee Epstein, for which Emily served as a teaching assistant. Three things about this encounter impressed me. First, Emily as an undergraduate had impressed Lee enough to get hired as both her teaching assistant and research assistant. I know of no other instance when Lee has hired a 1L for either job. Second, Emily told me in great depth about why she particularly admired Justice Sotomayor as a person and a jurist. Again, very few 1Ls show that degree of reflection. Third, after Emily wrote her lecture, she promptly returned the book to me. In my experience, that diligence places her in the 99th percentile of humanity.

The Legislation course provides much more opportunity for discussion, and Emily was an intellectual leader in the classroom. Her questions and comments, both in class and during office hours, showed great insight and poise. She has serious intellectual curiosity, with a strong desire to understand ideas and principles behind the law. She was much more likely than her classmates to ask critical questions, probing beneath the surface doctrine to explore the policy and political implications of the material. She listens carefully; she speaks and writes clearly and intelligently. I was especially impressed to learn that Emily had formed a reading group with two friends to dig deeply into recent important Supreme Court decisions. That project has nothing to do with Emily's immediate law school courses. She just wants to learn more.

Emily has already gained valuable professional experience that should help her hit the ground running as a judicial clerk. She served during her third semester as an extern for Judge Gruender on the Eighth Circuit. She spent her first law school summer at Bryan Cave in St. Louis. As Lee Epstein's research assistant, Emily performed detailed research on the Supreme Court and the federal judicial system. At this early stage in her legal training, she aspires to a career in litigation. She well understands the value of a clerkship for deepening her knowledge and skills.

Emily has a big personality, in the best sense. She never dominates conversations, but her classmates seem to pay close attention when she speaks up. She takes easily to engaging in a wide range of topics, and she radiates the kind of focus and self-assurance that characterizes many successful lawyers. I feel confident that, in addition to her substantive skills, she will bring a positive energy to the close confines of a judge's chambers.

Emily Fox is on a clear path to becoming one of this law school's leading lights. I respectfully urge you to give her serious consideration.

Best,

/s/

Gregory Magarian - gpmagarian@wustl.edu - (314) 935- 3394

Gregory P. Magarian
Thomas and Karole Green Professor of Law

*Washington University School of Law
One Brookings Drive, MSC 1120-250-258
St. Louis, MO 63130
(314) 935-6420*

Gregory Magarian - gpmagarian@wustl.edu - (314) 935- 3394

Emily Fox

1800 S. Brentwood Blvd. Apt 1127
St. Louis, MO 63144
(805)-827-8282 emilykfox@wustl.edu

Writing Sample

The attached writing sample is an adaptation of the open appellate brief I prepared for my Legal Writing II: Advocacy course. I reworked the writing style and substantive analysis following completion of the course. I represented the Appellee, the United States, in connection with the prosecution of Henry Tanner for possession of cocaine. DEA Agents Roberta Halston and Amy Renner seized cocaine from Defendant Henry Tanner's apartment after obtaining consent to search from his co-tenant, Mary Potter. This assignment required that I research and analyze relevant case law to persuade the Court to deny Defendant's motion to suppress the cocaine seized from his apartment. The following brief sets forth my argument to the United States Court of Appeals for the Seventh Circuit and incorporates feedback from my Legal Practice professor.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

The UNITED STATES OF AMERICA,
Appellee,

-against-

HENRY NOSTRUM TANNER,
Appellant.

Case No. 22-0062

BRIEF FOR THE UNITED STATES

Emily Fox
Attorney For the United States
204 S. Main Street
South Bend, Indiana 46601
(930)-555-6789

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OPINION BELOW

On November 12, 2021, the district court¹ denied Henry Tanner’s (“Defendant”) motion to suppress physical evidence. The District Court held that the search and seizure of Defendant’s cocaine (“Search”) comported with Defendant’s Fourth Amendment rights because it was conducted pursuant to valid consent from Defendant’s co-tenant, Mary Potter (“Co-tenant Potter”). The district court order is unpublished, but a copy is included in the attached record. (R. at 20–22.)

ISSUE PRESENTED

Whether the District Court correctly denied Defendant’s motion to suppress on the grounds that the Search comported with Defendant’s Fourth Amendment rights.

STATEMENT OF THE CASE

On September 23, 2021, Defendant was indicted on three counts: (1) 21 U.S.C. § 841(a)(1), possession with intent to distribute a controlled substance; (2) 21 U.S.C. § 844, possession of a controlled substance; and (3) 21 U.S.C. § 846, conspiracy to possess, with intent to distribute, a controlled substance. (R. at 1–2.)

¹ The Honorable Marcia L. Fenster, United States District Court for the Northern District of Indiana.

After the District Court denied Defendant's motion to suppress, Defendant pled guilty to Count Two on December 17, 2021. (R. at 23.)

Defendant resides at 3471A Oak Street in Riley, Indiana (the "Apartment") with his friend, Co-tenant Potter, and cousin, Olivia Tudor ("Co-tenant Tudor"). (R. at 13.) The co-tenants met as students at Bradford College. (R. at 14.) The three co-tenants have developed close relationships with each other while living together. They share the common areas of the Apartment: the living room, dining room, kitchen, and two bathrooms. (R. at 6.) Defendant updates Co-tenant Potter on his whereabouts during the week, and Co-tenant Potter and Co-tenant Tudor regularly share clothes. (R. at 14.)

DEA Agents Roberta Halston and Amy Renner ("Agents") were investigating the drug ring at Bradford College when they arrived at the Apartment on September 16, 2021. The Agents intended to meet with Defendant and discuss his potential involvement in the drug ring. They hoped to rule Defendant out as a suspect. (R. at 14.) Upon their arrival, Co-tenant Potter answered the door and invited the Agents into the Apartment. The Agents discussed the severe drug problem at Bradford College with Co-tenant Potter. (R. at 6.) When the Agents asked Co-tenant Potter questions about the living arrangement at the Apartment, she answered willingly and completely. Co-tenant Potter revealed that the three co-tenants have a trusting and open lifestyle. When Co-tenant Potter moved into the

Apartment in August 2021, both Defendant and Co-tenant Tudor told her she could use all areas of the Apartment. (R. at 6.) Defendant trusts Co-tenant Potter so much so that he allows her to use his bathroom (“Bathroom”), which is only accessible by walking through his bedroom. (R. at 6.)

During their conversation, the Agents looked around the Apartment to confirm Co-tenant Potter lived there. (R. at 7.) Once convinced Co-tenant Potter lived at the Apartment, the Agents obtained her consent to search. Co-tenant Potter willingly signed the consent form after thoughtfully considering the gravity of the situation. After Co-tenant Potter signed the consent form, Agent Halston began the Search as she typically would: she started from the outermost area of the Apartment (the Bathroom) and worked her way back. (R. at 7.) She searched the entire Bathroom, including an unmarked, unlocked bag (“Bag”) placed on an open shelf. (R. at 8.) Inside the Bag, Agent Halston found a bag of cocaine. At this point, Defendant returned home and was arrested by the Agents. (R. at 10.)

SUMMARY OF ARGUMENT

The District Court’s denial of Defendant’s motion to suppress should be affirmed because the Search comported with Defendant’s Fourth Amendment rights. Thus, Defendant’s conviction should be upheld.

Co-tenant Potter had authority to consent to the Search as a co-tenant at the Apartment. She willingly and knowingly consented to the Search, granting Agent

Halston permission to search anywhere in the Apartment Co-tenant Potter had authority to be and anything Co-tenant Potter had authority to use. Because Defendant granted Co-tenant Potter unqualified access to the Bathroom, Co-tenant Potter had actual authority to consent to its search. The Agents were thus permitted to search anything within the Bathroom that could have been under Co-tenant Potter's authority and contained drugs.

Even if Co-tenant Potter did not have actual authority to consent to a search of the Apartment, she had apparent authority to consent. After their conversation, the Agents believed Co-tenant Potter lived at the Apartment and could use the Bathroom. Agent Halston could not have exceeded the scope of Co-tenant Potter's apparent authority by searching the Bag because she reasonably believed Co-tenant Potter had authority over the Bag. Since Co-tenant Potter had actual, or at least apparent, authority to consent, and voluntarily did so, the Search comported with Defendant's Fourth Amendment rights, and his motion to suppress should be denied.

ARGUMENT

This Court reviews motions to suppress physical evidence *de novo*. *United States v. Groves*, 470 F.3d 311, 317–18 (7th Cir. 2006). Because a review of the totality of the circumstances proves that Co-tenant Potter had authority to consent to the Search and voluntarily did so, Defendant's motion to suppress must be

denied. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). Co-tenant Potter's consent was voluntary because she contemplated her decision before consenting, her education level suggests she easily understood the Agents' request for consent, and she was not coerced into consenting. *See Schneckloth*, 412 U.S. at 248 (finding voluntariness of consent accounts for education level, intelligence, and interactions with officers). The totality of the circumstances demonstrates that Co-tenant Potter voluntarily consented to the Search, and she had actual and apparent authority to do so. Thus, Defendant's motion to suppress must be denied.

I. Defendant's Motion to Suppress Must be Denied Because Co-tenant Potter Had Actual Authority to Consent to the Search.

Co-tenant Potter had actual authority to consent because she and her co-tenants permitted each other to "mutual[ly] use [] the property" and have "joint access or control for most purposes." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Co-tenant Potter, Co-tenant Tudor, and Defendant share joint access over the Apartment because they all live there, receive mail there, and keep clothes and personal belongings there. *See United States v. Denberg*, 212 F.3d 987, 991 (7th Cir. 2000) (joint access found when third party told officers she lived on premises, received mail, and kept clothes and personal belongings there). The Agents even confirmed that Co-tenant Potter had personal belongings in her bedroom before proceeding with the Search. Each co-tenant reduced his or her expectation of privacy by choosing to grant each other access to all of the common areas in the

Apartment. Because Co-tenant Potter had joint access to the Apartment, she had actual authority to consent to its search.

A. Co-tenant Potter’s Actual Authority over the Bathroom Allowed Her to Validly Consent to its Search.

By choosing to reduce his expectation of privacy and grant Co-tenant Potter permission to “use [his] bathroom if she wanted to,” Defendant gave Co-tenant Potter actual authority over the Bathroom. (R. at 6.) Co-tenant Potter’s ability to consent to the Bathroom’s search arose directly from her unfettered ability to use it. *See Matlock*, 415 U.S. at 170 (finding co-tenant had actual authority to consent to search of east bedroom because co-tenant used the bedroom). Defendant’s conscious choice to allow Co-tenant Potter to use the Bathroom was an assumption of the risk that she may allow someone to enter the Bathroom. After all, “[o]ne who shares a house or room or auto with another understands that the partner may invite strangers—that his privacy is not absolute but contingent in large measure on the decisions of another.” *United States v. Chaidez*, 919 F.2d 1193, 1202 (7th Cir. 1990).

This court has repeatedly held that, where a defendant consents to a co-tenant’s use of his space, he grants that co-tenant actual authority over that space. *See Chaidez*, 919 F.2d at 1202 (actual authority to consent to the search of every room in the house existed where lessee paid utilities and rent, had clothing in the bedroom, and could use the premises when defendant wasn’t present); *United*

States v. Aghedo, 159 F.3d 308, 310 (7th Cir. 1998) (co-tenant had actual authority to consent to search of the defendant's bedroom because the defendant granted her complete access to use the bedroom and allowed her to enter when he wasn't present). Co-tenant Potter's actual authority, too, arose from Defendant allowing her to use the Bathroom unconditionally. Since Defendant gave Co-tenant Potter actual authority to consent to a search of the Bathroom, his Fourth Amendment rights could not have been violated by the Search.

B. The Scope of Co-Tenant Potter's Consent Validly Extended to the Search of the Bag.

Through granting the Agents unconditional consent to search the Apartment, Co-tenant Potter gave the Agents power to search any item that could include the expressed object of the Search. *See Florida v. Jimeno*, 500 U.S. 248, 251 (1991) ("The scope of a search is generally defined by its expressed object."). By focusing their discussion on Defendant's potential involvement in the Bradford College drug ring, the Agents made Co-tenant Potter implicitly aware that her consent to search the Apartment included any objects that could be used to hide narcotics. "A reasonable person may be expected to know that narcotics are generally carried in some form of a container." *Jimeno*, 500 U.S. at 251. Therefore, Co-tenant Potter's authority to consent extended to any container that could be used to hold drugs.

Where the scope of the search is confined to its expressed object, this Court has denied motions to suppress. In *United States v. Ladell*, when the third party had

actual authority to consent to a search of the defendant's bedroom and knew that the officer was searching for guns, this Court held that the officer's search of a bag underneath the defendant's mattress was valid. *See* 127 F.3d 622, 624 (7th Cir. 1997). If this Court found no issue with officers searching for guns in a black, unmarked bag hidden from view underneath defendant's mattress, the scope of Co-tenant Potter's consent should easily have included the Bag on an open shelf.

Similarly, in *United States v. Melgar*, this Court denied the defendant's motion to suppress physical evidence found in a purse because the consenting party had actual authority to consent to a search of the area in which the purse was found, and the purse could have contained the expressed object of the search. *See* 227 F.3d 1038, 1041–42 (7th Cir. 2000). The purse searched in *Melgar* is afforded a considerably greater expectation of privacy than the Bag since a purse is an “extension of one's clothing because it serves as a larger pocket.” *United States v. Basinski*, 226 F.3d 829, 834 (7th Cir. 2000) (internal quotations omitted). Yet this Court still found the search valid because the purse could have contained the expressed object of the search. If an unmarked purse could be searched pursuant to third-party consent because it could contain the expressed object of the search, there is no denying Co-tenant Potter's consent included the authorization to search the Bag.

The touchstone of Fourth Amendment protection is reasonableness. *See Jimeno*, 500 U.S. at 250. Yet, it would not have been reasonable for Agent Halston to ask Co-tenant Potter for her consent to search every unmarked item within the Bathroom that could have contained narcotics. Rather, Agent Halston's search reasonably focused only on things within the Bathroom that could have belonged to Co-tenant Potter and contained drugs. Because Defendant, Co-tenant Potter, and Co-tenant Tudor all had the right to use the Bathroom, the Agents had no reason to believe that the Bag belonged specifically to Defendant. It was Co-tenant Potter's responsibility to inform the Agents if an item was outside her control since she voluntarily informed the Agents about her actual authority over the Bathroom. In only searching containers within the Bathroom that could contain drugs, Agent Halston comported with Defendant's Fourth Amendment rights, and his motion to suppress should be denied.

II. Even If Co-tenant Potter Did Not Have Actual Authority to Consent to the Search, She Had Apparent Authority Over the Common Areas.

The Agents conducted a valid search of the premises under Co-tenant Potter's apparent authority, at the very least, because they reasonably believed Co-tenant Potter had authority to consent to the Search. *See Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). Where, like here, a search is reasonable, apparent authority is all that is necessary to justify a search pursuant to third-party consent. *See, e.g., Rodriguez*, 497 U.S. at 187. The Search comports with the Fourth Amendment

because the Agents determined Co-tenant Potter had apparent authority by uncovering “indicia of [her] actual authority” over the Apartment. *United States v. Rosario*, 962 F.2d 733, 737 (1992).

A seasoned DEA agent like Agent Halston reasonably concluded that Co-tenant Potter’s statements regarding her use of the Apartment revealed her apparent authority to consent to the Search. Not only did Co-tenant Potter live at the Apartment, but Co-tenant Potter kept her personal belongings there and told the Agents she had unfettered access to the Apartment. Co-tenant Potter corroborated her statements by detailing the living arrangements at the Apartment and giving the Agents reason to believe that she actually lived there. *See United States v. Ryerson*, 545 F.3d 483, 489 (7th Cir. 2008) (found apparent authority to search garage where co-tenant was allowed entry to house, had personal items there, and knew about specifics of premises). By relying on Co-tenant Potter’s statements and actions, the Agents drew reasonable inferences about Co-tenant Potter’s authority to consent. Because the Agents had no reason to doubt Co-tenant Potter’s statements, they reasonably concluded that she had apparent authority to consent to the Search.

A. Co-tenant Potter had Apparent Authority to Consent to the Search of the Bathroom.

Co-tenant Potter had apparent authority over the Bathroom because, after hearing her statements about her unfettered access to the Bathroom, any reasonable agent would have concluded that Co-tenant Potter had authority to use the

Bathroom and thus consent to its search. Nothing more is needed to uphold the Search's validity. *See United States v. Garcia*, 690 F.3d 860, 864 (7th Cir. 2012) (search uncovering cocaine in closet was upheld because third party had at least apparent authority over the closet even though she did not live at the apartment).

Co-tenant Potter's relationship with Defendant would lead any reasonable agent to believe Co-tenant Potter when she said she was allowed to use the Bathroom. Defendant trusted Co-tenant Potter to use private areas of his space. Defendant even allowed Co-tenant Potter to walk through his room to access the Bathroom. Apparent authority is more readily ascertainable here than in *Garcia* because bathrooms are more likely to be shared than closets, especially by people who live together. The Agents had no reason to distrust Co-tenant Potter's representations about her relationship with Defendant and her unrestricted access to the Bathroom. Because the Agents based their finding of Co-tenant Potter's authority to consent on assertions by Co-tenant Potter that, if true, would grant her actual authority over the Bathroom, their search of the Bathroom comported with Defendant's Fourth Amendment rights.

B. Co-tenant Potter had Apparent Authority to Consent to the Search of the Bag.

Co-tenant Potter had apparent authority to consent to the search of the Bag because the Agents reasonably believed she had authority over any item in the Bathroom. Co-tenant Potter made no efforts to inform the Agents that she did not

have access to the Bag. *Compare Basinski*, 226 F.3d at 835 (finding locked container outside the scope of the search when the officers had knowledge that the container belonged to the defendant and the consenting party was not given the lock combination) with *United States v. Jackson*, 598 F.3d 340, 343 (7th Cir. 2010) (third party had apparent authority over a computer bag where third party gave the officers unlimited consent to search and the officers had no reason to know that the defendant forbade the search).

Defendant assumed the risk that the Bag would be subject to search when he stored it on an open shelf in the Bathroom and did not mark nor lock it. Neither the characteristics of the Bag nor the surrounding circumstances revealed one, particular owner of the Bag. Thus, from looking at the Bag, the Agents had no reason to believe the Bag could not nor did not belong to Co-tenant Potter. Further, without qualifying her consent, Co-tenant Potter gave the Agents no reason to believe she did not have authority over the Bag. No fault should lie on the seasoned Agents for acting in accordance with the information they were given at the time. *See Rodriguez*, 497 U.S. at 185 (reasonableness of the search is determined based on what the Agents knew at the time of the search). Because Co-tenant Potter's apparent authority extended over all containers in the Bathroom that could have been hers, the Agents' search of the Bag was reasonable.

CONCLUSION

Co-tenant Potter's residence at the Apartment and use of all its common areas gave her actual authority to consent to the Search. Even if she did not have actual authority to consent, the representations she made when conversing with the Agents led them to reasonably believe she had apparent authority to consent to a search over the Bathroom and any items within it that could have been hers, including the Bag. The Agents should not be faulted for relying on Co-tenant Potter's statements to conduct a lawful search of the Apartment. For the foregoing reasons, the Search did not violate Defendant's Fourth Amendment Rights. Thus, this Court should deny Defendant's motion to suppress and affirm his conviction.

Respectfully Submitted,

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Writing Sample: Law Review Note

The attached writing sample is the complete version of the note I submitted for publication consideration at *Washington University Law Review*. No changes have been made since I submitted it for publication consideration. This note analyzes the feasibility of adopting a third-gender category to regulate transgender-athlete participation in elite sport. I consider why a state-imposed third-gender category would fail intermediate scrutiny and how state public accommodation statutes would prevent private sport governing bodies from implementing a third-gender category.

Fairness for all? The Implications of Adopting a Third-Gender Category in Elite Sports

I. INTRODUCTION

On March 18, 2022, the NCAA Women's Division I Swimming and Diving Championships garnered national attention for more than just the record-breaking swims. The second day of competition saw Lia Thomas, the first known openly transgender athlete to compete at the NCAA Championships, beat out a field of Olympians in the 500 yard freestyle.¹ Even though Thomas competed in accordance with the NCAA's transgender-athlete guidelines, and finished nine seconds behind Katie Ledecky's American record,² cries of concern and outrage poured in

¹ Dan D'Addona, *2022 NCAA Women's Championships Day 2 Finals: Lia Thomas Wins 500 Freestyle 'It Means the World,'* SWIMMING WORLD MAG. (Mar. 17, 2022), <https://www.swimmingworldmagazine.com/news/the-2022-ncaa-womens-championships-day-2-finals-500-freestyle/>. Thomas also placed fifth in the 200-yard freestyle and eighth in the 100-yard freestyle.

² For reference, if Ledecky had been racing against Thomas, Ledecky would have finished over half a pool length before Thomas did. At the 2022 NCAA Championships, the difference between first (Thomas) and second (Emma Weyant) was only one-and-a-half seconds. *See 2022 NCAA Division I Women's Swimming & Diving Championships Results*, HY-TEK'S MEET MANAGER 7.0, <https://swimswam.com/wp-content/uploads/2022/03/2022-NCAA-Division-I-Women-Swimming-Diving-Championships-Final-Results.pdf>.

against Thomas from across the nation.³ Thomas's participation highlights the questions facing elite sports organizations⁴ today: who can compete, in what category, and what must athletes do to be eligible.

Elite sports in the modern era are governed by a complex network of private organizations. Within the United States, the Ted Stevens Amateur Sports Act grants the United States Olympic and Paralympic Committee (USOPC) the power to recognize national governing bodies (NGBs) for any sport that is included on the program of the Olympic, Paralympic, or Pan-American Games.⁵ To be eligible for recognition, an NGB must, among other requirements, be the member

³ Sarah Berman, *Protestors Against Lia Thomas Stand Outside & Attend Women's NCAA Championship*, SWIM SWAM NEWS (Mar. 17, 2022), <https://swimswam.com/protestors-against-lia-thomas-stand-outside-attend-womens-ncaa-championship/>.

⁴ This note will focus on elite sports. The NCAA Division I Swimming and Diving Championships are still a relevant example of the problems facing elite sports in implementing transgender-inclusive participation policies because a majority of All-Americans (the top eight finishers per event at NAAs) are USA Swimming National Team Members. *Compare* James Sutherland, *CSCAA Announces 2021-22 NCAA Division I Women's All-Americans*, SWIM SWAM NEWS (Mar. 30, 2022), <https://swimswam.com/cscaa-announces-2021-22-ncaa-division-i-womens-all-americans/>, with USA SWIMMING, *Women's National Team 2022-2023 Roster*, <https://www.usaswimming.org/docs/default-source/national-teamdocuments/rosters/2022-2023-nt-roster-women-final.pdf>.

⁵ 36 U.S.C. § 220521(a).

of “no more than one international sports federation.”⁶ Once recognized as members of their respective international federations (IFs),⁷ NGBs are part of the Olympic movement⁸ and receive instruction from the International Olympic Committee (IOC).⁹ Outside of IOC guidelines, NGBs are typically given considerable leeway to regulate sports. Dionne Koller, a professor of sports law, argues that the federal government’s hands-off approach to regulating sports “has translated into a generous degree of legal insulation for sports leagues, administrators, and regulators, especially in the way that they manage athletes and structure the games.”¹⁰

⁶ 36 U.S.C. § 220522(a)(6). After recognition, the USOPC recommends and supports the NGB “to the appropriate international sports federation as the representative of the United States for that sport.” 36 U.S.C. § 220531(c).

⁷ International Federations, as recognized by the Olympic Charter, are authorized by the International Olympic Committee “to establish and enforce, in accordance with the Olympic spirit, the rules concerning the practice of their respective sports and to ensure their application.” INT’L OLYMPIC COMM., *Olympic Charter*, 56 (2021).

⁸ “The Olympic Movement is the concerted, organised, universal and permanent action, carried out under the supreme authority of the IOC, of all individuals and entities who are inspired by the values of Olympism.” INT’L OLYMPIC COMM., *Olympic Movement* (2021), <https://olympics.com/ioc/olympic-movement#:~:text=Olympic-Movement,by%20the%20values%20of%20Olympism>.

⁹ INT’L OLYMPIC COMM., *Olympic Charter*, *supra* note 7 at 12.

¹⁰ Dionne L. Koller, *Putting Public Law into Private Sport*, 43 PEPP. L. REV. 681, 688 (2016).

The power structure created by the Olympic Charter and the Ted Stevens Act grants IFs great influence over the policies within the sports they oversee, including how competition will be categorized.¹¹ Until recently, the separation of elite sport competition into male and female categories has been accepted without controversy. However, as Lia Thomas’s participation in elite swimming demonstrates, “[t]he creation of a separate category for female athletes inevitably leads to a fundamental conundrum—precisely who should be allowed to compete in women’s sports?”¹²

In 2022, the IF regulating international aquatic sports, World Aquatics,¹³ attempted to answer this question by proposing a third-gender category for all female-identifying athletes whose testosterone levels are too high to compete in the female category.¹⁴ This note explores how World

¹¹ To use aquatic sports as an example, “the national body governing swimming, open water swimming, diving, high diving, water polo, artistic swimming, and Masters in any country or Sport Country shall be eligible to become a FINA member” under World Aquatics’s constitution. Once a member, a NGB is obliged to comply with World Aquatics’s rules at all times, including directives and decisions of the World Aquatics bodies. FEDERATION INTERNATIONALE DE NATATION CONST. C 7–8. (FINA is now known as World Aquatics).

¹² Joanna Harper, *Athletic Gender*, 80 LAW & CONTEMP. PROBS. 139, 139 (2017).

¹³ World Aquatics was previously known as Federation Internationale de Natation. World Aquatics’s primary purpose is to promote and encourage the advancement of aquatics in all possible aspects throughout the world. See FEDERATION INTERNATIONALE DE NATATION, *Policy on Eligibility for the Men’s and Women’s Competition Categories* 9 (Jun. 2022) [hereinafter “World Aquatics Policy”].

¹⁴ See *Id.* at 9; *infra* Part II.a.

Aquatics's proposed third-gender category would fare under the laws of the United States if implemented by United States sports-governing bodies. Part II summarizes the preexisting barriers to elite competition for transwomen athletes and discusses how World Aquatics's proposal would further eliminate any possibilities for transwomen athletes to compete in line with their gender identity. The remaining parts explain the legal challenges United States sports organizations will face if they choose to implement a third-gender category. Because states have already begun regulating transgender participation in scholastic sports, it is not unreasonable to assume they may take further measures to regulate transgender participation in all sporting activities within their borders.¹⁵ Part III focuses on the likely constitutional challenges state actors will face under the Equal Protection Clause of the Fourteenth Amendment should they try to enact a third-gender

¹⁵ Several states have already taken measures to regulate transgender-athlete participation in women's sports within their borders. Those statutes reaching collegiate sports impact elite athletes on their teams. *See* ARIZ. REV. STAT. ANN. § 15-120.02 (2022); ARK. CODE ANN. § 6-1-107 (2021); FLA. STAT. § 1006.205 (2021); IDAHO CODE § 33-6203 (2020) (preliminarily enjoined by *Hecox v. Little*, 479 F. Supp. 3d 930 (D. Idaho 2020)); IND. CODE § 20-33-13-1-4 (2022); IOWA CODE § 261I.1 (2022); LA. STAT. ANN. 4:441-446 (2022); MISS. CODE ANN. § 27-97-1 (2021); MONT. CODE ANN. § 20-7-1306 (2021); OKLA. STAT. tit. 70, § 27-106 (2022); S.C. CODE ANN. § 59-1-500 (2022); TENN. CODE ANN. § 49-7-181 (2022); TEX. EDUC. CODE ANN. § 33.0834 (West 2022); W. VA. CODE § 18-2-25d (2021) (preliminarily enjoined by *B. P. J. v. W. Va. State Bd. Of Educ.*, 550 F. Supp. 3d 347 (S.D.W. Va. 2021)).

category by law. Part IV discusses how non-state actor private sports organizations,¹⁶ like NGBs, would be liable under state public accommodations statutes¹⁷ and fail the Ted Stevens Act's NGB recognition requirements¹⁸ if they attempted to implement a third-gender category. By providing a roadmap of a potential legal challenge to a third-gender category in both scenarios, this note cautions sports regulatory bodies against adopting a third-gender category within elite sports.¹⁹

II. TRANSWOMEN ATHLETES IN ELITE SPORT: BARRIERS TO PARTICIPATION

¹⁶ While authorized by Congress through the Ted Stevens Act, neither the USOPC nor NGBs are state actors. Thus, they are not subject to constitutional restraints. *See S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542–44 (1987); *Behagen v. Amateur Basketball Ass'n*, 884 F.2d 524, 530–31 (10th Cir. 1989) (holding NGBs are at least nominally private parties because they are farther removed from congressional action than USOPC).

¹⁷ Many states have public accommodations statutes that prohibit discrimination based on sex or gender identity in public accommodations. *See infra* note 154.

¹⁸ An amateur sports organization, like an NGB, is eligible for recognition only if it “provides an equal opportunity to amateur athletes, coaches, trainers, managers, administrators, and officials to participate in amateur athletic competition without discrimination on the basis of . . . sex” 36 U.S.C. § 220522(a)(8). All elite athletes, including professionals, who wish to compete on the international stage are still governed by NGBs. *See* 36 U.S.C. § 220523(a)(6).

¹⁹ A discussion of the significant practical concerns that also caution against adopting a third-gender category to regulate transwomen participation in elite sport is outside the scope of my note. I will focus solely on the legal challenges such a category may face if adopted in the United States.

Transwomen athletes bear the brunt of the “who can compete as a female” conundrum. Yet, outside of sports, transgender women are largely not required to qualify their womanhood.²⁰ Whether due to lack of resources or social stigma, transgender women are often unable to transition from their sex assigned at birth until after male puberty impacts their biological development.²¹ In the context of sports, the potential post-puberty biological advantage transgender women may have over cisgender women has prompted regulation of transgender women’s participation in elite sport. In the mid-2000s, gender verification in sport shifted from genetic sex testing to hormone testing; scientists settled on testosterone levels as the key to determining the advantage male athletes have

²⁰ Transgender individuals “are those who have a gender identity that is not fully aligned with their sex assigned at birth.” AMERICAN PSYCHOLOGICAL ASS’N, *Guidelines for Psychological Practice with Transgender and Gender Nonconforming People*, 1 (2015). Nations embrace transgender individuals to a variety of degrees. While transgender individuals are accepted in the United States as equal citizens, acceptance of transgender individuals is not universal. *See generally* United Nations Human Rights Office of the High Comm’r, *The Struggle of Trans and Gender-diverse Persons*, UNITED NATIONS (2022), <https://www.ohchr.org/en/special-procedures/ie-sexual-orientation-and-gender-identity/struggle-trans-and-gender-diverse-persons>.

²¹ *See infra* Part III.c.2.ii.

over females.²² Hormonal regulation of testosterone levels is now assumed to come as a price transwomen athletes must pay should they want to compete in line with their gender identity.²³

Even as hormone regulation technology and social norms develop, the IOC and IFs continue to confront basic issues of how to categorize athletes while respecting their dignity and gender identity. In elite sports, the IOC instructs IFs to independently determine eligibility criteria

²² Ashley J. Bassett et al., *The Biology of Sex and Sport*, 8 J. BONE & JOINT SURGERY, INC. 1, 2 (2020). *See also* Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 74 (2017) (“Although other factors are influential, the average 10–12% performance gap between non-doped elite male and elite female athletes is almost entirely attributable to the bimodal and non-overlapping production of testosterone, including to these testosterone-driven attributes.”).

²³ The United Nations has starkly criticized attempts by IAAF (now World Athletics) to classify female athletes based on their testosterone levels. The UN called World Athletics’s plans “unnecessary, humiliating, and harmful.” *See Caster Semenya: United Nations Criticises ‘Humiliating’ IAAF Rule*, B.B.C. (Mar. 25, 2019), <https://www.bbc.com/sport/athletics/47690512>. Yet, most IFs require transwomen athletes to regulate their testosterone levels to compete in the female category. *See infra* note 25 and accompanying text. Additionally, transition treatments typically include suppressing testosterone. *See* Cecile A. Unger, *Hormone Therapy for Transgender Patients*, 5 TRANSLATIONAL ANDROLOGY & UROLOGY 877, 889–90 (2016). Thus, this note assumes that some form of testosterone suppression will be required when regulating transwomen athlete participation in the female sports category.

for athletes who do not fit within traditional binary gender distinctions.²⁴ Each sport's specific regulations focus on outlining the requirements for non-cisgender female-identifying athletes to compete in the female category of their respective sports.²⁵ Because most IFs are currently grappling with how to allow transwomen athletes to compete in female-gender categories, this note will focus on the problems facing elite transwomen athletes.²⁶

²⁴ INT'L OLYMPIC COMM., *IOC Framework on Fairness, Inclusion and Non-Discrimination on the Basis of Gender Identity and Sex Variations* (Nov. 2021).

²⁵ See World Aquatics Policy, *supra* note 13 at 7 (requiring transgender women to transition before Tanner Stage 2 or the age of 12 and to maintain testosterone levels of 2.5 nmol/L or lower post-transition); WORLD ATHLETICS, *Eligibility Regulations for Transgender Athletes* 4–5 (Oct. 2019) (requiring transgender women to maintain testosterone levels below 5 nmol/L for twelve months before competing); INTERNATIONAL TENNIS FEDERATION, *ITF Transgender Policy* 1 (Nov. 2018) (mirroring World Athletics's policy). For a comprehensive list of IF policies, see Transathlete.com, *International Federations*, (last visited Mar. 2, 2023). <https://www.transathlete.com/international-federations#:~:text=Transgender%20women%20are%20only%20eligible,or%20lower%20since%20age%2012.>

²⁶ Any policy proposals discussed would also apply to intersex athletes who are sometimes barred from competition due to their inability to conform with certain gender policies. See Basset et al., *supra* note 22, at 6 (discussing how individuals with hyperandrogenism and differences of sex development (DSD) or other intersex traits were most impacted in their eligibility to compete at the onset of hormone testing in elite sport based on their heightened testosterone levels).

a. World Aquatics's 2022 Proposal

World Aquatics proposed a novel method to maintain its traditional binary categories while allowing transgender athletes the opportunity to compete. World Aquatics's policy allows transwomen athletes to compete in the women's category²⁷ as long as they can prove to World Aquatics's satisfaction that they have not experienced any part of male puberty beyond Tanner Stage two²⁸ or before age twelve, whichever is later.²⁹ Yet, those transwomen athletes who do not transition at this early age would "not meet the applicable criteria for the . . . women's category."³⁰ These athletes would be relegated to a proposed third "open category . . . in which an athlete who

²⁷ If they so choose, transgender women are permitted under World Aquatics's policy to continue competing in the male category. *See* World Aquatics Policy, *supra* note 13, at 8–9. However, this option does not negate World Aquatics's policy's affront to transwomen athletes's desires to compete in line with their gender identity. Thus, it does not provide a solution to the problem of inclusion.

²⁸ "Tanner Stage 2 denotes the onset of puberty. The normal time of onset of puberty ranges from 8 to 13 years old in females, and from 9 to 14 years old in males." *Id.* at 4.

²⁹ *Id.* at 7. World Aquatics's 2022 Policy regarding hormone regulation has been codified in the most recent edition of its Competition Regulations. *See* WORLD AQUATICS, *Competition Regulations* 11–12 (Feb. 21, 2023).

³⁰ *Id.* at 9. It is unclear from World Aquatics's rules if these women would be able to compete in the female category without transitioning before puberty even if they were able to reduce their testosterone levels to be within the "normal range" for women via hormone treatments.

meets the eligibility criteria for that event would be able to compete without regard to their sex, their legal gender, or their gender identity.”³¹

World Aquatics states that its policy will ensure equal opportunity of men and women in sport, competitive fairness and physical safety, and the development of the sport and its popular appeal.³² Yet, by prioritizing gender-specific sport categories,³³ World Aquatics ensures that transgender athletes forced to compete in any promulgated third-gender category will be unable to compete in their gender-identity category. This proposal has been criticized by the transgender-athlete community as “the very definition of ‘separate but equal’ and an extreme indignity to the women affected.”³⁴ While normative arguments may guide gut instincts as to whether elite transwomen athletes should ever be allowed to compete in the female category, this note primarily focuses on discounting the legal merits of World Aquatics’s proposed “solution” to including transwomen athletes in elite sport. Our merits discussion begins with state actors.³⁵ If a state actor relegated transwomen athletes to a third-gender category, the state would fail to give those athletes an equal opportunity to compete in sports as the Constitution requires. Thus, we turn to the likely

³¹ *Id.*

³² *Id.*

³³ *Id.* at 1.

³⁴ Simon Evans, “‘Open Category’ Proposal Faces Questions Over Fairness and Viability,” REUTERS (Oct. 1, 2022), <https://www.reuters.com/lifestyle/sports/open-category-proposal-faces-questions-over-fairness-viability-2022-06-23/>.

³⁵ NGBs and other private sports organizations are not state actors. *See supra* note 16. Thus, their actions are constrained by other laws, as will be discussed in Part IV.

confrontation between a state’s hypothetical third-gender category and the Equal Protection Clause of the Fourteenth Amendment.

III. STATE ACTORS: EQUAL PROTECTION CHALLENGES

The Equal Protection Clause of the Fourteenth Amendment forbids a state from denying “to any person within its jurisdiction the equal protection of the laws.”³⁶ Current equal protection jurisprudence will allow a successful attack to a state-implemented third-gender category for transwomen athletes. For the purposes of this note, I will presume any adopted third-gender category proposal would adopt World Aquatics’s condition that transwomen athletes can compete in the women’s category so long as have not experienced male puberty “beyond Tanner Stage 2 or before age 12, whichever is later.”³⁷ Thus, if transwomen athletes do not meet these standards, they may either compete in the male category or in “any open events,” but they may not compete in the female category.³⁸

a. Principles of Equal Protection Jurisprudence

Although the Equal Protection Clause was adopted to eradicate racial discrimination,³⁹ it has been successfully used by litigants to challenge other discriminatory government classifications. The Supreme Court adjudicates equal protection challenges under three tiers of scrutiny—strict, intermediate, or rational basis review.⁴⁰ Which level of scrutiny the Court applies

³⁶ U.S. CONST. amend. XIV, § 1, cl. 3.

³⁷ World Aquatics Policy, *supra* note 13, at 7. *See also supra* note 28.

³⁸ World Aquatics Policy, *supra* note 13, at 9.

³⁹ *See* The Slaughterhouse Cases, 83 U.S. 36, 67–69 (1872).

⁴⁰ NOAH FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 645 (20th ed.).

to the challenge depends on the suspect nature of the classification.⁴¹ For example, because classifications based on race “are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy,” they are reviewed under strict scrutiny.⁴² Most laws do not pass this demanding standard.⁴³ Conversely, classifications receive rational basis review when courts do not believe fundamental rights or suspect classifications are at issue.⁴⁴ In this most lenient standard, “legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.”⁴⁵ This standard provides the government substantial leeway in regulating based on non-suspect classifications.⁴⁶

⁴¹ Kevin M. Barry, Brian Farrell, Jennifer L. Levi & Neelima Vanguri, *A Bare Desire to Harm: Transgender People and the Equal Protection Clause*, 57 B.C. L. REV. 507, 541 (2016).

⁴² *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). *See also* Marcy Strauss, *Reevaluating Suspect Classifications*, 35 SEATTLE UNIV. L. REV. 135, 137 (2011) (discussing requirements for classification to receive strict scrutiny).

⁴³ Under strict scrutiny, “the government must demonstrate a compelling purpose for the distinction drawn and prove that such a classification is necessary to achieve that purpose.” Strauss, *supra* note 42, at 137.

⁴⁴ *See* Barry et al., *supra* note 41, at 542.

⁴⁵ *Cleburne*, 473 U.S. at 440.

⁴⁶ For example, in *FCC v. Beach Communications, Inc.*, the Supreme Court applied rational basis review to evaluate an equal protection challenge to franchising requirements under an FCC order. *See generally* 508 U.S. 307 (1993).

The Court has recognized that, between these two extremes, certain quasi-suspect classes are subjected to intermediate (or heightened) scrutiny. Sex is “only *quasi*-suspect because . . . the Supreme Court has recognized ‘inherent differences’ between the biological sexes that might provide appropriate justification for distinctions.”⁴⁷ Any quasi-suspect classification “must serve important governmental objectives and must be substantially related to achievement of those objectives” to survive a constitutional attack.⁴⁸

b. Transgender-status Discrimination: What Level of Scrutiny Applies?

While the tiers-of-scrutiny framework is well established, the Court has not delineated clear guidelines on how it determines which classification receives which level of scrutiny.⁴⁹ Lower courts are left to sift through “a mixture of criteria to determine suspectness, creating an analytical muddle, and the boundary line between suspect classes and nonsuspect classes is drawn in a haphazard way.”⁵⁰ Thus, where the Supreme Court has not affirmatively applied a level of scrutiny

⁴⁷ *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020) (emphasis in original) (*citing* *United States v. Virginia*, 518 U.S. 513, 534 (1996)). The Supreme Court has used the terms “gender” and “sex” interchangeably in applying intermediate scrutiny. *See generally Virginia*, 518 U.S. at 531–58.

⁴⁸ *Craig v. Boren*, 429 U.S. 190, 197 (1976). *See also Virginia*, 518 U.S. at 531 (“Parties who seek to defend gender-based governmental action must demonstrate an “exceedingly persuasive justification” for that action.”).

⁴⁹ Strauss, *supra* note 42, at 138.

⁵⁰ Thomas Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107, 141 (1990).

to a specific classification, lower courts are left to decide how to adjudicate constitutional challenges.

Transgender classifications currently stand in this limbo. While the Supreme Court held in *Bostock v. Clayton County* that, under Title VII, transgender discrimination constitutes discrimination on the basis of sex, the Court has not addressed a *constitutional* challenge to transgender discrimination.⁵¹ The circuits that have adjudicated equal protection challenges to transgender classifications have justified applying intermediate scrutiny⁵² to transgender classifications either by finding that transgender classifications are quasi-suspect⁵³ or by analogizing classifications based on transgender status to classifications based on gender or sex.⁵⁴

⁵¹ See 140 S.Ct. 1731, 1741 (2020). Title VII is not coterminous with the Equal Protection Clause. See Kenneth L. Marcus, *The War Between Disparate Impact and Equal Protection*, 2008–2009 CATE SUP. CT. L. REV. 53, 53 (2009). However, the Court’s decision in *Bostock*, compounded with the more specific decisions of circuit courts to review transgender-status discrimination like gender discrimination, supports the inference that a future transgender-status challenge reviewed by the Supreme Court would be reviewed under intermediate scrutiny.

⁵² Existing Supreme Court precedent does not support the potential application of strict scrutiny to transgender classifications. See *Karnoski*, 926 F.3d at 1199. Thus, the only debate concerns whether rational basis or intermediate scrutiny will be applied.

⁵³ See *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020).

⁵⁴ See *Smith v. City of Salem*, 376 F.3d 566 (6th Cir. 2004); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011); *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017); *Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019); *Brandt v. Rutledge*, 47 F.4th 661 (8th Cir. 2022).

The remainder of this Part will survey those circuit court decisions. It will show that, under either rationale, a state regulation creating a third-gender category in elite sport would be reviewed under intermediate scrutiny.

i. Transgender Classifications as a Quasi-Suspect Class

In *United States v. Virginia*, Justice Ginsburg explained that sex classifications are only “quasi-suspect” because of inherent physiological differences between males and females.⁵⁵ The Fourth Circuit extended that principle to transgender classifications in *Grimm v. Gloucester County School Board*,⁵⁶ where it applied a four-factor suspect class test⁵⁷ considering: 1) whether the class has been historically subject to discrimination; 2) whether the class has a defining characteristic that impacts its ability to contribute to society; 3) whether the class can be defined as a discrete group based on immutable characteristics; and 4) whether the class is a minority lacking political power.⁵⁸ After analyzing each factor, the Fourth Circuit found that transgender

⁵⁵ *United States v. Virginia*, 518 U.S. 513, 534 (1996).

⁵⁶ 972 F.3d 586, 611 (4th Cir. 2020). The Fourth Circuit also would have subjected the policy at issue to intermediate scrutiny because Grimm was subjected to sex discrimination when he failed to conform to the sex stereotype promulgated by his school’s bathroom policy. *Id.* at 608. For a more detailed analysis as to why transgender classifications are quasi-suspect, see Barry et al., *supra* note 41, at 551–567.

⁵⁷ This test is not universally adopted. As mentioned above, courts are inconsistent in their methodology when determining “suspectness.” However, courts frequently use some combination of these factors in determining whether a class is suspect or not. *See Strauss, supra* note 42, at 146.

⁵⁸ *Grimm*, 972 F.3d at 611.

individuals constitute a quasi-suspect class.⁵⁹ If the Supreme Court similarly applied this four-factor test, any classification based on transgender status would receive intermediate scrutiny without an inquiry into the substance of the regulation.

ii. Transgender Status as a Classification on the Basis of Sex

Even if transgender classifications are not deemed “quasi-suspect,” the Supreme Court would apply intermediate scrutiny if the transgender classification regulated based on sex.⁶⁰ In doing so, the Court may rely on one of the two, non-exclusive rationales used by the lower courts to determine that transgender classifications regulate based on sex. First, if transgender classifications facially discriminate on the basis of sex, they will receive intermediate scrutiny review. Second, the lower courts have applied intermediate scrutiny to transgender classifications because they constitute gender-based stereotyping under the Supreme Court’s *Price Waterhouse v. Hopkins* precedent.⁶¹ Whether a court determines transgender classifications are facially

⁵⁹ First, based on evidence provided by amici, the Fourth Circuit found that “[d]iscrimination against transgender people takes many forms.” *Id.* Second, “being transgender bears no such relation” to the ability to contribute to society. *Id.* at 612. Third, “being transgender is not a choice.” *Id.* And lastly, transgender people make up less than a tenth of a percent of the United States adult population and are underrepresented in every branch of government. *Id.* at 613.

⁶⁰ See *supra* note 51 and accompanying text.

⁶¹ See 490 U.S. 228, 251 (1989) (holding gender stereotyping in employment decisions is sex-based discrimination under Title VII). See also *Craig v. Boren*, 429 U.S. 190, 212 n.5 (1976) (Stevens, J., concurring).

discriminatory against transgender individuals or inherently gender stereotyping (or both), intermediate scrutiny applies.

1. *Facially Discriminatory Policies*

Where policies facially regulate transgender status, circuit courts have applied heightened scrutiny. In *Karnoski v. Trump*, the Ninth Circuit held that a policy barring transgender individuals from serving in the military due to “gender dysphoria” facially regulates transgender status and must be subject to an intermediate standard of review.⁶² Most recently in *Brandt v. Rutledge*, the Eighth Circuit held that a policy prohibiting medical professionals from providing gender-affirming care to minors discriminates on the basis of sex “because a minor’s sex at birth determines whether or not the minor can receive certain types of medical care under the law.”⁶³ Thus, heightened scrutiny must be applied.⁶⁴

2. *Gender Stereotyping*

Three circuits have applied intermediate scrutiny to transgender classifications because they constitute gender stereotyping. The Sixth Circuit was the first to apply gender-stereotyping reasoning to transgender classifications, holding in *Smith v. City of Salem* that employment discrimination based on gender non-conformity assumes certain traits are innately associated with one gender and not the other, constituting discrimination based on gender stereotype and requiring

⁶² *Karnoski v. Trump*, 926 F.3d 1180, 1199–1201 (9th Cir. 2019).

⁶³ *Brandt v. Rutledge*, 47 F.4th 661, 669 (8th Cir. 2022). *See also* Barry, et al., *supra* note 41, at 569–70.

⁶⁴ *Brant*, 47 F.4th at 670.

review under heightened scrutiny.⁶⁵ Both the Eleventh and Seventh Circuits relied on the Sixth Circuit’s reasoning in *Smith* and the Supreme Court’s decision in *Price Waterhouse* to justify applying heightened scrutiny to transgender classifications as discrimination based on gender stereotyping.⁶⁶ In *Glenn v. Brumby*, the Eleventh Circuit held that, because transgender individuals inherently do not conform to the stereotypes of their sex assigned at birth, discrimination based on gender non-conformity is discrimination based on gender-based behavioral norms.⁶⁷ The Seventh Circuit followed suit in *Whitaker v. Kenosha Unified School District*,⁶⁸ affirming a preliminary injunction allowing the plaintiff, a transgender male, to use the school bathroom correlating to his gender identity because “the School District’s policy cannot be stated without referencing sex. . . . This policy is inherently based upon a sex classification and heightened scrutiny applies.”⁶⁹

⁶⁵ *Smith*, 376 F.3d at 576 (“Individuals have a right, protected by the Equal Protection clause of the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment.”).

⁶⁶ For a more detailed discussion on how transgender classifications are grounded in sex stereotypes, see Barry et al., *supra* note 41, at 568–69.

⁶⁷ *Glenn v. Brumby*, 663 F.3d 1312, 1316–17, 1319 (11th Cir. 2011).

⁶⁸ “By definition, a transgender individual does not conform to the sex-based stereotypes that he or she was assigned at birth.” *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034, 1048 (7th Cir. 2017).

⁶⁹ *Id.* at 1051. The District of Idaho has also held statutes regulating transwomen participation in sports to be facially discriminatory, thus warranting heightened scrutiny, because these statutes “discriminate[] between cisgender athletes, who may compete on athletic teams consistent with

These decisions neatly justify why a constitutional challenge to a state policy requiring a third-gender category in elite sports would require intermediate scrutiny. A policy like World Aquatics's inherently regulates on the basis of sex because the implementing state would have to dictate which characteristics count as "female" for a female competitor and "male" for a male competitor. Thus, distinctions are made based on an athlete's sex at birth. Additionally, this delineation promotes a state-sponsored ideal of what is required of someone to be "female" or "male" to compete in those respective categories, thereby associating certain innate characteristics with one gender but not the other. This is gender-stereotyping, which requires heightened review.

Regardless of which rationale prevails, it seems likely that the Supreme Court will follow the consensus of the circuits and apply intermediate scrutiny to transgender classifications.⁷⁰ Thus, a third-gender category challenged under the Equal Protection Clause would be reviewed under this framework. The following Section details the next step of the equal protection analysis: applying intermediate scrutiny.

c. Intermediate Scrutiny Applied

The remainder of the equal protection inquiry is inherently fact specific. Under intermediate scrutiny, the government must show "at least the [challenged] classification serves important governmental objectives and that the discriminatory means employed are substantially

their gender identity, and transwomen athletes, who may not compete on athletic teams consistent with their gender identity." *Hecox v. Little*, 479 F. Supp. 3d 930, 975 (D. Idaho 2020).

⁷⁰ See *supra* note 51 and accompanying text.

related to the achievements of those objectives.”⁷¹ The government’s justification “must be genuine, not hypothesized or invented *post hoc* in response to litigation.”⁷² Thus, a court must first consider the veracity of the proffered governmental interest before assessing whether the statutory framework is substantially related to that interest.⁷³

This section will evaluate the salience of two important interests that World Aquatics offered to justify its third-gender category: first, protecting the safety of cisgender female athletes (the “safety rationale”); and, second, protecting the integrity of women’s sports (the “fairness

⁷¹ *United States v. Virginia*, 518 U.S. 515, 533 (1996). *See also* *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982); *Craig v. Boren*, 439 U.S. 190, 197 (1976); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 441 (1985).

⁷² *Virginia*, 518 U.S. at 533.

⁷³ There are limitations on an equal protection challenge. When bringing a challenge, a litigant can allege the statute is facially unconstitutional or unconstitutional as applied. A facial attack, which is strongly disfavored by the law, is only successful where any application of the statute would be unconstitutional. *See* Alex Kreit, *Making Sense of Facial and As-Applied Challenges*, 18 WM. & MARY BILL OF RIGHTS J. 657, 657–58 (2010). A litigant alleges an as-applied challenge when a statute, even if generally constitutional, is unconstitutional when applied to the litigant because of the litigant’s circumstances. *Id.* at 657. The outcome of a third-gender-category challenge will likely depend upon whether a litigant brings a facial or as-applied challenge because sports-specific characteristics may make certain government interests more salient in one sport than others. *See infra* Part III.c.i.

rationale”).⁷⁴ Before discussing the merits of both the safety and fairness rationales, it is important to recognize the limits upon the regulatory scope of a third-gender category like World Aquatics’s. While elite sport has been left largely privatized and unregulated by state or federal involvement,⁷⁵ recently, the issue of transwomen participation has sparked legislation from some states within the interscholastic arena.⁷⁶ Even the U.S. House of Representatives is currently considering a bill that would restrict the ability of transgender athletes to compete according to their gender identity.⁷⁷ States regulating transgender athlete participation at the scholastic level have largely done so under the guise of “fairness” for women’s sport competition.⁷⁸ The state interest in regulating state-sponsored public-school activity is much stronger than any state interest in regulating mostly-privately-run elite sporting activities. It will be helpful to compare arguments made in cases challenging state regulation of transgender individuals in the scholastic context. However, it is

⁷⁴ I rely on the interests put forth by World Aquatics because no state has adopted a third-gender category mandate yet. These rationales do mirror those used by states to justify regulating scholastic sport gender classifications. *See supra* note 15.

⁷⁵ *See* 36 U.S.C. § 2205.

⁷⁶ *See supra* note 15 and accompanying text.

⁷⁷ *See* H.R. 734, 118th Cong. (1st Sess. 2023).

⁷⁸ For example, Idaho’s currently-enjoined transgender participation ban is entitled the “Fairness in Women’s Sports Act.” IDAHO CODE § 33-6203 (2020).

crucial to recognize that under intermediate scrutiny the state must offer an important interest in regulating *elite sport* specifically.⁷⁹

i. Safety Rationale

Any state argument that relegating transwomen athletes to a third category protects the safety of cisgender female athletes is grounded in the assumption that transgender women have an innate physical advantage that will endanger cisgender women.⁸⁰ While scientific studies do show a marginal retention in strength among transwomen athletes who have undergone hormone treatments, such studies do not show any additional safety risk these retained strength benefits may impose upon cisgender female athletes above and beyond those they already face in contact-sport competition.⁸¹ When considering the safety concerns *between* individual women competitors within an the female sports category, they are far less evident than the media may make them seem.

⁷⁹ See *infra* note 133. Because any regulation would be in the context of elite sport, Title IX does not apply. See 20 U.S.C. § 1681(a)(1) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *education program or activity* receiving *federal* financial assistance.”) (emphasis added).

⁸⁰ It is undeniable that performance advantages of male-at-birth athletes over cisgender female athletes are well documented. See Part III.c.ii.1. However, our inquiry must center on whether any advantages transwomen athletes may have over cisgender female athletes create a heightened risk to the safety of cisgender female athletes when they compete against transwomen athletes.

⁸¹ See *infra* notes 92, 113 and accompanying text.

First, consider non-contact sports. Any safety rationale would fall flat here because there is no risk of contact between athletes. Swimmers and track athletes compete in separate lanes.⁸² Gymnasts compete individually on the competition floor. Even if we consider open-road non-contact sports like distance running or cycling, there is no heightened risk of a collision injury simply because a cisgender woman is competing next to a transgender woman.

Safety concerns have more weight if a third-gender policy is applied to contact sports. However, it is important to recognize that female athletes already compete against other female athletes that are bigger, taller, or stronger than they are simply because everyone is unique. We celebrate athletes who have innate biological advantages in sport, even if that can make them more dangerous in contact sports. As the director of the Center for Genetic Medicine Research at Children's National Hospital in Washington, D.C. has remarked, "[e]ven if transgender athletes retain some competitive advantages, it does not necessarily mean that the advantages are unfair, because all top athletes possess some edge over their peers."⁸³ So, to meet their burden of showing an important interest, proponents of a third-gender category would need to show some heightened,

⁸² Additionally, warm up areas are already mixed gender where both male and female events are held at the same venue, so there can be no added safety risk from allowing transwomen athletes to compete, regardless of what category in which they do so.

⁸³ Gillian R. Brassil & Jere Longman, *Who Should Compete in Women's Sports? There Are 'Two Almost Irreconcilable Positions,'* N.Y. TIMES (Aug. 18, 2020) <https://www.nytimes.com/2020/08/18/sports/transgender-athletes-womens-sports-idaho.html>.

unreasonable risk that necessitates state intervention in regulating within the “female” gender category.⁸⁴

That “heightened risk” cannot be shown via examples of sports injuries to cisgender women caused by transgender women competitors. In fact, few examples of these injuries during competition can be found.⁸⁵ The example cited by many advocates who wish to keep transgender women out of female sports is the 2014 knockout of Tamikka Brents by transgender MMA fighter Fallon Fox. Fox fractured Brents’s orbital bone, forcing the fight to a halt in just over two and a half minutes.⁸⁶ An example like this seems to make the safety threat to cisgender female athletes

⁸⁴ If studies were available to show that sports injuries increase based on contact between cisgender female athletes and transwomen athletes, this argument would be stronger. However, the lack of a proven insurmountable biological advantage retained by transwomen athletes weakens any causal link states may try to argue exists between relegating transwomen athletes to a third category and promoting the safety of cisgender female athletes. *See infra* notes 92, 113 and accompanying text.

⁸⁵ Chris Mosier, *As Elite Sports Think Again About Trans Participation, Our Only Demand is For Fairness*, THE GUARDIAN (Jun. 29, 2022), <https://www.theguardian.com/commentisfree/2022/jun/29/sports-trans-participation-transgender-women-swimming>.

⁸⁶ Rhavesh Purohit, *When Transgender Fighter Fallon Fox Broke Her Opponent’s Skull in MMA Fight*, SPORTSKEEDA (Sept. 20, 2021), <https://www.sportskeeda.com/mma/news-when-transgender-fighter-fallon-fox-broke-opponent-s-skull-mma-fight>.

competing with transgender women more foreboding.⁸⁷ Yet, while it is undeniable that the Fox/Brents fight shows the danger MMA athletes face when they step in the ring, we have no evidence that Brents could not have obtained that same injury in a fight against a cisgender woman.⁸⁸ And the Brents example is singular: more recent instances of injuries like the one sustained by Brents in her fight with Fox are difficult, if not impossible, to find.

But still, advocates against transwomen participation in women's sport will try to combine daunting stories like the Fox-versus-Brents fight with cherry-picked studies showing that males do

⁸⁷ See Peyton MacKenzie, *Transwomen Should Not Compete Against Biological Women*, LIBERTY CHAMPION (Jan. 24, 2022), <https://www.liberty.edu/champion/2022/01/transgender-women-should-not-compete-against-biological-women/> (highlighting “deeper problem” of safety concerns raised by allowing transgender athletes to compete with biological female athletes); Frank Mir & Terry Schilling, *Not a Fair Fight: Our Athlete Daughters Shouldn't have to Compete with Transwomen*, USA TODAY (Feb. 25, 2021), <https://www.usatoday.com/story/opinion/2021/02/25/transgender-women-unfair-playing-field-for-girls-column/6813749002/> (using example of earlier Fox MMA fight to exemplify fears of allowing their daughters to compete against transwomen athletes who transitioned post-puberty).

⁸⁸ Orbital fractures are a common MMA injury. In their empirical study, Michael Fliotsos and colleagues found that over seventy percent of MMA injuries were to the eye, and fourteen percent of those were orbital bone fractures. See Michael Fliotsos et al., *Prevalence, Patterns, and Characteristics of Eye Injuries in Professional Mixed Martial Arts*, 15 CLINICAL OPHTHALMOLOGY 2759, 2762 (2021).

have a post-puberty biological advantage over females⁸⁹ to support their argument that any innate post-puberty advantages are insurmountable, even with hormone treatment.⁹⁰ In reality, these arguments can be easily discredited. Advantages sustained by transwomen athletes are *not* insurmountable. Almost all major sports bodies require transwomen athletes to undergo testosterone-suppressing treatment before they can compete in the female category.⁹¹ Testosterone treatment *does* help reduce the innate biological differences that transgender women have after going through male puberty.⁹² With testosterone treatment, transgender women reduce their lean

⁸⁹ See *infra* note 107 and accompanying text.

⁹⁰ See Timothy A. Roberts, Joshua Smalley & Dale Ahrendt, *Effect of Gender Affirming Hormones on Athletic Performance in Transwomen and Transmen: Implications for Sporting Organisations and Legislators*, 55 BRIT. J. SPORTS MED. 577, 581 (2021) (noting that, while study observed decrease in strength among transwomen engaged in testosterone suppression, “exposure to testosterone during puberty results in sex differences in height, pelvic architecture and leg bones in the lower limbs that confer an athletic advantage to males after puberty” which “do not respond to changes in testosterone exposure among post-pubertal adults.”). *But see infra* note 92 and accompanying text.

⁹¹ See *supra* note 25.

⁹² See Joanna Harper, Emma O'Donnell, Behzad Soroui Khorashad, Hilary McDermott & Gemma L. Witcomb, *How Does Hormone Transition Change Body Composition, Muscle Strength and Haemoglobin? Systematic Review with a Focus on the Implications for Sport Participation*, 55 BRIT. J. SPORTS MED. 865, 872 (2021) (“Longitudinal and cross-sectional studies identify that

body mass, muscle cross-sectional area, and muscular strength, posing less of a risk of injury to any of their fellow competitors if there were a collision on the court.⁹³ While testosterone suppression may not *completely* eliminate the innate biological advantages transwomen athletes have,⁹⁴ physical advantages are suppressed to a degree that makes competition safer for all involved.⁹⁵

The lack of scientific evidence justifying proposed safety concerns, the lack of examples of injury, and the decreased advantage sustained following gender affirming hormone treatment each undermine the safety rationale as an important interest. Thus, the safety rationale cannot justify a state-implemented third-gender category in elite sport.⁹⁶ If a state third-gender category is to survive, it needs a different justification. So, we turn to a second purported rationale for a third-gender category: preserving the fairness of women's sports.

hormone therapy in transwomen decreases muscle cross-sectional area, lean body mass, strength and haemoglobin levels, with noted differences in the time course of change.”).

⁹³ *See id.*

⁹⁴ *See, e.g.,* Alison K. Heather, *Transwoman Elite Athletes: Their Extra Percentage Relative to Female Physiology*, 19 INT’L J. ENVIRO. RSCH. & PUB. HEALTH 1, 6 (2022).

⁹⁵ *See infra* note 113 and accompanying text.

⁹⁶ Even if safety qualified as an important government objective, “it does not bear a substantial relationship to the practice of excluding all and only girls, including those who would face no more safety risk than the average boy.” Erin Buzuvis, *Law, Policy, and the Participation of Transgender Athletes in the United States*, 24 SPORTS MGMT. REV. 439, 448 (2021).

ii. *Fairness Rationale*

Many states regulate transgender participation in *public-school* sports to “preserve” the fairness of female sports.⁹⁷ First, to discern why a state may be able to regulate the intricacies of the female category in *elite* sports, it is worth exploring the root of sports’ binary gender classifications as it relates to fairness. This will allow us to understand why states attempt to regulate sport-participatory classifications to preserve fairness in the first place. From there, this part will discuss impacts that state regulations have on transgender athletes as citizens meant to be protected by the laws of their state. It is contradictory to justify a policy that is intrinsically unfair to transgender women by removing them from the female sports category only to maintain fairness for cisgender women. Lastly, this part will use a recent case in the Connecticut public-school system to show additional reasons a “fairness rationale” may, but ultimately cannot, be sustained under the first prong of intermediate scrutiny.

1. *The Origins of the Sport Gender Binary*

The gender binary in sports originated from the exclusion of women from male athletics.⁹⁸ “The ‘maleness’ of sport derived from a gender ideology which labeled aggression, physicality, competitive spirit, and athletic skill as masculine attributes necessary for achieving true

⁹⁷ See *supra* note 15.

⁹⁸ For example, Baron Pierre de Coubertin, the founder of the IOC, refused to add women to the Olympics in 1912 because “[a] female Olympics would be inconvenient, uninteresting, un-aesthetic and not correct. The true Olympic hero is, in my opinion, the individual male adult.” Sylvain Ferez, *From Women’s Exclusion to Gender Institution: A Brief History of the Sexual Categorisation Process within Sport*, 29 INT’L J. HIST. SPORT 272, 273 (2012).

manliness.”⁹⁹ Thus, elite sport as a domain was reserved for men through the early decades of the twentieth century, so the invention of “[t]he women’s sports category [was] the result of the historical exclusion of women from competitive sport.”¹⁰⁰

The exclusion of women from elite sport is grounded in the assumption that “all males (born or ‘made’) have a physical advantage over all females (born or ‘made’).”¹⁰¹ Scholars like Clair Sullivan, a researcher on the intersection of gender and sport, label this assumption the “advantage thesis” and argue that it is fundamental to a mythical “ethic of ‘fair play’” followed by most sporting organizations to separate their competitions by sex.¹⁰² This notion of “fair play” and, thus, the sex-dichotomy in sport is seen as central to preserve opportunities for elite female athletes to achieve financial gain and fame, but its inception is based in little other than historical

⁹⁹ Susan K. Cahn, *From the “Muscle Moll” to the “Butch” Ballplayer: Mannishness, Lesbianism, and Homophobia in U.S. Women’s Sport*, 19 FEMINIST STUD. 343, 344 (1993).

¹⁰⁰ E-Alliance, *Transwomen Athletes and Elite Sport: A Scientific Review*, 34 (2020).

¹⁰¹ Clair E. Sullivan, *Gender Verification and Gender Policies in Elite Sport: Eligibility and ‘Fair Play,’* 35(4) J. SPORT & SOC. ISSUES 400, 402 (2011).

¹⁰² *Id.* at 401.

exclusion¹⁰³ and generalized biological differences between male and female athletes.¹⁰⁴ Because the gender dichotomy was not originally about science, it is not well justified at this point. Therefore, a state would need to develop concrete scientific proof of an insurmountable transwoman-athlete advantage to justify further regulation within what was, at its inception, a binary founded upon historically assumed distinctions and discrimination.

Yet scientific proof cannot concretely show that transwomen athletes have an insurmountable advantage at the elite level.¹⁰⁵ Of course, trends in a wide variety of sports clearly show that men are more athletically adept than women. For example, looking at comparisons between the best women track athletes in the 100 meters and 400 meters in 2017, each event's

¹⁰³ Through the Nineteenth Century, women's athletic endeavors were limited and criticized due to the belief that each human had a fixed amount of energy, and it would be hazardous for women to engage in physically arduous activities, especially while menstruating. *See* Richard C. Bell, *A History of Women in Sport Prior to Title IX*, SPORT J. (Mar. 14, 2008), <https://thesportjournal.org/article/a-history-of-women-in-sport-prior-to-title-ix/>. When women gained access to sport, it was primarily within their own category. *Id.* Since then, the rationale for separate gender categories in sport has rested on fairness grounds, regardless of whether this categorization is the best mechanism for instituting "fair play." Sullivan, *supra* note 101, at 402.

¹⁰⁴ "On average, men perform better than women in sport; however, no empirical research has identified the specific reason(s) why." Bethany Alice Jones, Jon Arcelus, Walter Pierre Bouman & Emma Haycraft, *Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies*, 47 SPORTS MED 701, 713 (2017).

¹⁰⁵ *See infra* Part III.d.i.

Olympic, World, and U.S. Champion's time (Tori Bowie and Allyson Felix, respectively) was outperformed by over 15,000 men and boys in that year.¹⁰⁶ It is true that differences between the processes of male and female puberty produce innate biological advantages for males.¹⁰⁷ However, we are not comparing men and women. As will be discussed below, transgender women do not, and will not, have the same physical advantages as male athletes once they undergo hormone treatment.¹⁰⁸ Additionally, while categorizing athletics by gender does create a greater opportunity for women to be competitive, we have no evidence that state regulation of transwomen athletes's participation is necessary to preserve that opportunity.¹⁰⁹ Even if fairness concerns have historically justified the gender binary in elite sports, there is little evidence to suggest that the *state* has an interest in further regulating competition categories, especially in the context of elite

¹⁰⁶ See Doriane Lambelet Coleman & Wickliffe Shreve, *Comparing Athletic Performances: The Best Elite Women to Boys and Men*, DUKE L. CTR. FOR SPORTS L. & POL. (2022), <https://law.duke.edu/sports/sex-sport/comparative-athletic-performance/>.

¹⁰⁷ “All developing embryos become feminized unless masculinizing influences [androgens] come into play at key times during gestation Testicular production of testosterone is primarily responsible for the difference in male and female testosterone levels, both during development and throughout the individual's lifetime.” Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS. 63, 71–72 (2017).

¹⁰⁸ See *infra* Part III.d.i.

¹⁰⁹ “There is no firm basis available in evidence to indicate that trans women have a consistent and measurable overall performance benefit after 12 months of testosterone suppression.” E·Alliance, *supra* note 100, at 8.

sport. Even if the historical binary justifies further state regulation within categories at the surface level, investigating the impacts of such regulation on transwomen athletes diminishes the state interest in fairness.

2. *Impact of Third-gender Categories on Transwomen Athletes*

If a state determines that certain individuals who identify as women cannot compete as women, the state is depriving those individuals of fair treatment under the law.¹¹⁰ By trying to promote the fairness of women's sports, a state is forced to deprive transgender women of fair competitive opportunities. Additionally, this type of regulation in effect subdivides women into those deemed female enough and those not: a state justifies regulating which women compete in the "female" category and which compete in the "third-gender" category to "protect the integrity of women's sports" by defining who gets to be a true female and who is "other."¹¹¹ Yet, medically, transgender women treated via testosterone suppression for at least a year experience decreases in muscle mass and hemoglobin levels, the latter of which typically falls within the normal biological-

¹¹⁰ See *supra* Part III.a.

¹¹¹ It is true that sports have typically been categorized using language referencing biological sex. However, "[i]n sport, the terms 'sex'/'gender', 'male'/'man' and 'female'/'woman' are often conflated by commentators, some sport academics and sport organisations." Irena Martinkova, Taryn Knox, Lynley Anderson & Jim Parry, *Sex & Gender in Sport Categorization: Aiming for Terminological Clarity*, 49 J. PHIL. SPORT 134, 135 (2022). This includes World Aquatics, who refers to categories in terms of gender but refers to athletes in terms of sex. *Id.* Thus, we should be careful to avoid overexaggerating the importance of sports categories using the term "female" over "woman" when discussing who should be allowed to compete in the traditional binary categories.

female range.¹¹² Additionally, it is well established within the medical community that transgender women are women.¹¹³ By relegating transgender athletes to a third category, a state would be telling them that they are not “woman” enough to compete. This type of justification “undermines their autonomy to identify as members of the gender with which they desire to participate.”¹¹⁴ When a state’s purported rationale further marginalizes an already historically-discriminated-against class of individuals, such a rationale can hardly ever be an “important government interest.”¹¹⁵ This is especially true in the context of sports, where history shows no clear rationale

¹¹² See Harper, et al., *supra* note 92, at 870–71.

¹¹³ Every person has a gender identity, which cannot be altered voluntarily or ascertained immediately after birth. Colt Meier & Julie Harris, AM. PSYCHOL. ASS’N, *Fact Sheet: Gender Diversity and Transgender Identity in Children* 1, <http://www.apadivisions.org/division-44/resources/advocacy/transgender-children.pdf>; see also Am. Acad. of Pediatrics, *Gender Identity Development in Children* (2015), <https://healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and-Gender-Confusion-In-Children.aspx>. “Being transgender is not a choice.” Grimm v. Gloucester Cty. Sch. Bd., 972 F.3d 586, 612 (4th Cir. 2020).

¹¹⁴ Erin Buzuvis, *Law, Policy, and Participation*, *supra* note 96, at 441.

¹¹⁵ A state should be particularly wary when trying to regulate transgender individuals because many suffer from gender dysphoria. Gender dysphoria is characterized by extreme mental health impacts resulting from the incongruence between an individual’s gender identity and sex assigned at birth. AM. PSYCHIATRIC ASS’N, *Diagnostic and Statistical Manual of Mental Disorders* 451–53 (5th ed. 2013). One of the critical methods of treatment is social transition, which requires living one’s life in accord with one’s gender identity. A third-gender category can limit the ability of

for sex-categorization other than that it is what has always been done since women began competing in elite sport.¹¹⁶ It can hardly be said that states have an important interest in regulating the “fairness” of women’s sports when the purported rationale for distinguishing between male and female athletics is grounded largely in outdated notions of female incapacity.¹¹⁷ Knowledge that differences in athletic performance between male and female athletes still exist should not justify the relegation of transwomen athletes to a third category when insurmountable performance advantages after at least a year of testosterone suppression cannot be proven.¹¹⁸ In an area as

transgender athletes to socially transition, thus worsening the mental health ramifications of gender dysphoria. A government policy negatively impacting a class of citizens to this extent can hardly further an important government interest. For further discussion on the impact of transgender athlete marginalization on gender dysphoria, see Mary E. Dubon, Kristin Abbott & Rebecca L. Carl, *Care of the Transgender Athlete*, 17 CURRENT SPORTS MED. REPS. 410, 415–16 (2018).

¹¹⁶ This note does not argue against the separation of male and female sports. It is clear that, at least now, male athletes do have performance advantages, post-puberty, over female athletes. However, it does not logically follow that transwomen athletes should be relegated to a third category under the guise of “fairness” for the same reasons that created the gender binary in sport, especially when a preexisting sports category aligns with their preferred gender identity.

¹¹⁷ See Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900 (2012) (“Because laws based on animus cannot survive rational basis review, by definition neither can they survive intermediate or strict scrutiny.”). See also *supra* note 44; *infra* Part III.d.i.

¹¹⁸ See *supra* Part I and *infra* Part III.c.2.iii for discussions about the checkered track record of elite or nearly-elite transwomen athletes’s winning streaks.

privatized as elite sport, where state governments have only recently started regulating,¹¹⁹ creating a third-gender category to insulate the female gender category cannot evince an important government interest where the government has not taken a stance before, let alone a stance so intrusive into the identity of transgender individuals.

3. *Why Policies are Being Challenged: Between a Rock and a Hard Place*

A recent Connecticut case¹²⁰ exemplifies the difficulties that sports administrative bodies face when balancing the competitive opportunities for cisgender and transwomen athletes. In *Soule v. Connecticut Association of Schools*, the plaintiffs contended that the Connecticut Interscholastic Athletic Conference policy violated Title IX.¹²¹ The policy allows high school students to compete on gender specific athletic teams consistent with their gender identity (even if different from their sex assigned at birth).¹²² The plaintiffs argue that the policy deprives cisgender athletes of a chance to be champions and the records-of-results could affect prospects at future employment.¹²³ However, all three plaintiffs beat the transwomen athletes they competed against at least once,

¹¹⁹ See Koller, *supra* note 10, at 685 (discussing the lack of law enacted to regulate sports). States have recently begun regulating in areas aimed at sports health and safety, such as in the concussion context. See *id.* at 683; *supra* note 15.

¹²⁰ *Soule v. Conn. Assoc. of Schs.*, No. 21-1365-cv, 2022 WL 17724715 (2d Cir. Dec 16, 2022).

¹²¹ *Id.* at *1.

¹²² *Id.*

¹²³ *Id.* The Second Circuit did not rule on the merits, instead dismissing the case because the plaintiffs lacked standing. *Id.*

showing that transwomen athletes do not have some insurmountable performance advantage, even without testosterone treatment.¹²⁴

While this case was filed under Title IX by private individuals arguing against transwomen participation in the female category, states could use the arguments raised by the plaintiffs to provide some additional support for a governmental “fairness” rationale in the elite context. These two arguments (deprivation of a chance to be champions and lost employment) are especially relevant in elite sports where participants are professional athletes. Thus, being deprived of a “chance to be champions” (by losing to a transwoman athlete) may very well be detrimental to a cisgender female’s employment prospects.¹²⁵ This is especially evident in individual sports like swimming or track and field. Elite individuals are selected for international travel teams based on placement in competition.¹²⁶ Thus, states may argue they are protecting the fair opportunity for

¹²⁴ *Id.* at *2.

¹²⁵ I recognize I am combining the two rationales proffered by the plaintiffs in *Soule*. I do this because deprivation of a “chance to be champions” in this context would fail as it did in *Soule* because all athletes are being given the opportunity to compete. *Cf.* McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 295–96 (2d Cir. 2004).

¹²⁶ In swimming, a country can send their top two athletes in each individual event to the Olympics, so long as they achieve the Olympic Qualification Time. Sean McAlister, *How to Qualify for Swimming at Paris 2024. The Olympics Qualification System Explained*, INT’L OLYMPIC COMM. (Oct. 1, 2022), <https://olympics.com/en/news/how-to-qualify-for-swimming-at-paris-2024>. In track and field, the top three athletes from a country may qualify for individual Olympic events. Sean McAlister, *How to Qualify for Athletics at Paris 2024. The Olympics Qualification System*

women to compete for national team spots and preserving equal employment opportunities between male and female athletes.

This argument may sound persuasive at first glance. However, there is no reason that cisgender athletes cannot be competitive with transgender athletes.¹²⁷ Additionally, while this rationale protects the rights of cisgender athletes, it does not prevent the state from depriving transwomen athletes from the right to compete and gain employment opportunities.¹²⁸ If transwomen athletes are forced into a third category, there will be no meaningful, equal opportunity for them to compete for spots on international team rosters at all.¹²⁹ Unless a third-

Explained, INT’L OLYMPIC COMM. (Dec. 20, 2022), <https://olympics.com/en/news/how-to-qualify-paris-2024-athletics-qualification-system-explained>.

¹²⁷ See *Soule v. Conn. Assoc. of Schs.*, No. 21-1365-cv, 2022 WL 17724715 at *2 (2d Cir. Dec 16, 2022); 2022 NCAA Division I Women’s Swimming & Diving Championships Results, *supra* note 2.

¹²⁸ Historically, athletes competing outside “mainstream” athletic competitions have not received the same opportunities as athletes in the traditional sports paradigm. For example, Paralympic athletes only recently received equal pay for medaling at the Paralympics. Oksana Masters, *Paralympians to Earn Equal Payouts as Olympians in the USA*, INT’L PARALYMPIC COMM. (Sept. 24, 2018), <https://www.paralympic.org/news/paralympians-earn-equal-payouts-olympians-usa>.

¹²⁹ It is undeniable that in elite sports, coming in third rather than second can cost an athlete a trip to the Olympics. However, while the practical drawbacks of a third-gender category are outside the scope of this note, if transwomen athletes are forced into a third category, there will be no meaningful, equal opportunity for them to compete for Olympic spots at all. See *infra* Part IV.b.

gender category is equally competitive and can give its participants the same opportunities at all levels of competition, a state third-gender policy inherently restricts transwomen athletes's opportunities in order to preserve cisgender female athletes's opportunities.

This part has shown that the rationales states use to justify regulating transgender participation in scholastic sports are not sufficient to support state regulation of transgender participation in elite sport. At the very least, neither safety nor fairness concerns can support relegating transwomen athletes to a distinct competitive category. However, even if a court finds that a state has an important interest in regulating transgender participation in elite sport via a third-gender category, the state still must prove that a third-gender category is a sufficiently related means to implement that interest under intermediate scrutiny.¹³⁰ It is to this prong of equal protection analysis we now turn.

d. Substantial Relation

Even if regulating to protect the safety or fairness of women's sports were important-enough government interests, the means adopted are not substantially related to either of those interests. For a state to justify a third-gender category, the state would need to rationalize regulating even more invasively than based on physiological differences between men and women¹³¹ because

¹³⁰ See, e.g., *Craig v. Boren*, 429 U.S. 190, 200 (1976) (statistics presented by the state were not substantially related to its proffered important interest).

¹³¹ *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 607 (4th Cir. 2020) (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440–41 (1985); *United States v. Virginia*, 518 U.S. 515, 534 (1996)).